

IN THE ARBITRATION UNDER CHAPTER 11
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

- - - - -	-x	:
CANFOR CORPORATION,	:	:
Claimant/Investor,	:	:
and	:	:
UNITED STATES OF AMERICA,	:	:
Respondent/Party.	:	:
- - - - -	-x	Volume 3

Thursday, December 9, 2004

The World Bank
701 18th Street, N.W.
"J" Building
Assembly Hall B1-080
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:08 a.m. before:

PROF. EMMANUEL GAILLARD, President

PROF. JOSEPH WEILER, Arbitrator

MR. CONRAD HARPER, Arbitrator

Also Present:

YAS BANIFATEMI,
Administrative Secretary to the Arbitral
Tribunal

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1 P R O C E E D I N G S

2 PRESIDENT GAILLARD: Good morning, ladies
3 and gentlemen. I open the hearing in the third day
4 of the arbitration--of the hearing in the
5 arbitration between Canfor Corporation and the U.S.
6 of America under the UNCITRAL Rules and NAFTA
7 Chapter 11.

8 Before we start, I want to state for the
9 record unless I hear otherwise, I can take it both
10 parties have received this morning the CD of
11 yesterday's transcript, but that you are yet to
12 receive the hard copy. So, I take it the hard copy
13 will be received shortly, during the next hour, to
14 be on the safe side. So, that's for the hearing.

15 For the technicalities, that's it.

16 Mr. Gonzalo Flores has something to add of
17 an organizational nature.

18 THE SECRETARY: Thank you, Mr. President.
19 It's just to set forth for the record that both
20 parties and the Tribunal have also received copies
21 of the audio recordings made during the session of
22 December 7 and 8. That's all.

1 PRESIDENT GAILLARD: Thank you very much,
2 Mr. Gonzalo Flores.

3 So, now we can resume the hearing where we
4 left it. We were in a Q-and-A session, and the
5 Tribunal was asking a number of questions. Are
6 there things of a preliminary nature which would be
7 a leftover of yesterday's questions that claimant
8 first would like to answer, and then ask the same
9 question to defendant?

10 MR. LANDRY: Nothing from claimant's
11 perspective.

12 Oh, sorry, with the exception of the
13 question from Mr. Harper. Obviously, we are ready
14 to answer that question, but besides that, no.

15 PRESIDENT GAILLARD: That's exactly where
16 we left it, so that we will resume with that. But
17 I'm talking about a leftover of all the questions
18 we raised yesterday, you have no frustration,
19 nothing you want to say in addition to what you
20 already said; is that correct? Claimant's side?

21 MR. LANDRY: That's correct.

22 PRESIDENT GAILLARD: Thank you.

1 On the U.S. side?

2 MS. MENAKER: Other than the factual
3 question that was left pending with us, we have
4 nothing to supplement our answers from yesterday.

5 PRESIDENT GAILLARD: Of course,
6 Ms. Menaker, thank you, we are going to get back to
7 that. We have not forgotten that one.

8 All right. So, maybe we resume where we
9 left it, and that was precisely the answer expected
10 from Professor Howse of question asked, I believe,
11 by Mr. Harper.

12 Mr. Howse.

13 PROFESSOR HOWSE: Thank you,
14 Mr. President.

15 Mr. Harper, I hope you won't mind if I
16 just read back the question to refresh it in my own
17 mind. You asked, suppose Chapter 11 had an Article
18 that stated, quote, this chapter shall not be
19 construed as imposing obligations on a party with
20 respect to the party's antidumping law or
21 countervailing duty law. Such law in each
22 instance, including relevant statutes, legislative

1 history, regulations, administrative practice, and
2 judicial precedents. Then you ask, would it be
3 Canfor's position, if that were the case, that its
4 Statement of Claim can be a basis for relief from
5 this Tribunal?

6 Now, just as when I draft an exam
7 question, as I did this morning for my class with a
8 hypothetical, usually a couple of students will
9 come back and say, what ought we to suppose or not
10 suppose, and they're not always the least diligent
11 students. So, if you will--I beg your indulgence
12 just to ask you a couple of questions about what we
13 are to suppose.

14 And the first question would be, where
15 would you imagine this appearing in Chapter 11?
16 Would it be under scope and coverage or under
17 dispute settlement or elsewhere? It might make a
18 difference where it appears to how it could affect
19 potentially the arguments that are before us now.

20 ARBITRATOR HARPER: I would suggest that
21 you tell me what the differences would be,
22 depending upon the location of the supposition.

1 PROFESSOR HOWSE: That's fair enough, sir.

2 Then that's what I will do.

3 And secondly, are we to suppose that the
4 architecture of Chapter 19 remains the same? In
5 other words, we take some of the language or most
6 of it in 1901(3), we add on to it the definitions
7 in 1902, but otherwise all of the architecture of
8 Chapter 19 remains the same. Was that your
9 intention?

10 ARBITRATOR HARPER: We certainly could
11 make that assumption. My view would be that we
12 should assume there is no change whatever in
13 Article 19, and I guess that leaves open the
14 proposition that the drafters were being
15 particularly careful by in a sense repeating
16 themselves in the supposed addition to Chapter 11.

17 PROFESSOR HOWSE: That's enormously
18 helpful.

19 So, now I feel comfortable responding.

20 Well, let's begin with the possibility
21 that this provision occurred under the heading
22 "Scope and Coverage" in 1101. The first part of my

1 response would be that--and just to remind you
2 without repeating it because I think the Tribunal
3 is well aware of it, Canfor's argument is that
4 obligations on a party with respect to the party's
5 antidumping law or countervailing duty law are
6 obligations that might be imposed to, you know,
7 either alter or not alter in a certain way the
8 normative material, the legal rules to be applied.

9 So, in the sense that this language
10 remains the same, Canfor's claim would fully stand
11 because our claim is not based upon problems with
12 the law understood as the normative material to be
13 applied. But I think the Tribunal understands well
14 this submission of Canfor, and it's been discussed
15 and questioned extensively.

16 So, in that respect our claim would remain
17 exactly the same, but for the Tribunal, surely
18 there would be the task still of interpreting this
19 provision, and whether it might have significance
20 in some way--in other words, having a full
21 understanding.

22 So, maybe I should go on, if you think

1 it's necessary, and talk a bit about, you know,
2 what other considerations might be involved in a
3 full understanding if this provision were in
4 Chapter 11, or have I answered your question about
5 how it would affect our claim?

6 ARBITRATOR HARPER: Only if you think you
7 have.

8 PROFESSOR HOWSE: Fine. Then, if there
9 are other questions such as--well, you did ask what
10 significance would it make where it appears, so
11 perhaps I should just say something about that.

12 I mean, one of the interpretive issues
13 with respect to 1901(3) itself is the issue of
14 whether it is in any respect a bar to jurisdiction
15 as opposed to an interpretive provision that might
16 be relevant to interpreting and applying the norms
17 in Chapter 11 on the merits. And so in sort of
18 puzzling that out on your hypothetical, if this
19 provision were under scope and coverage, we would
20 have to compare it with the language of 1101(3)
21 with respect to financial services, which is very,
22 very different, which says this Chapter does not

1 apply to measures adopted or maintained by a party
2 to the extent that they are covered by Chapter 14,
3 and I think that one would want to ask why such
4 different language here about antidumping law or
5 countervailing duty law than the language about
6 financial services.

7 Another possibility is that the provision
8 could occur under reservations and exceptions
9 which, you know, are in 1108. If they occurred
10 under reservations and exceptions, these seem to be
11 limited exceptions. In other words, they seem to
12 be talking about specific articles or very specific
13 limitations on the application. And again here the
14 language is does not apply to any measure, for
15 example. And then one would have to puzzle out why
16 this provision that you've devised as a
17 hypothetical is wondered so differently from the
18 other reservations and exceptions.

19 Now, there is a third possibility which is
20 like with respect to spelling out to what extent
21 competition matters are subject to arbitration
22 under Chapter 11. The provision might occur in

1 settlement of disputes between a party and an
2 investor of another party. You could put that
3 there.

4 Now, if you put that there, I think
5 that--that would be a fairly clear signal this goes
6 to jurisdiction in some way. In other words,
7 Canfor's argument that language such as construed
8 and other structural features of 1901(3) suggest
9 that this provision is not a jurisdictional bar or
10 intended to be so, but is of an interpretive
11 nature. I think we would have to answer some
12 questions and reconsider somewhat that argument if
13 you put this provision within, you know, the rubric
14 settlement of disputes because that would sound
15 much more like the parties were intending the
16 provision to actually affect access rights for
17 investors to dispute settlement.

18 So, that's to sort of explain why just
19 this one issue of where it appears might affect the
20 interpretive questions, if we were dealing with
21 this hypothetical problem, but it does not affect
22 our claim in the sense that the language here

1 remains such that what we are complaining of does
2 not fall within this, whether it's an exception or
3 a jurisdictional bar or whatever.

4 ARBITRATOR HARPER: Professor Howse, let
5 me ask you to assume that the Tribunal differed
6 from Canfor's position and determined this language
7 was not restricted; the hypothetical language was
8 not restricted to normative concerns, but was
9 broader than that. What would be your answer as to
10 the effect of this supposed language if placed in
11 Article--in the Chapter 11?

12 PROFESSOR HOWSE: So, in other words, the
13 Tribunal would be reading this as if it said with
14 respect to the party's antidumping law or
15 countervailing duty measures, which is language,
16 for example, that we have said would probably
17 indicate that not just the normative material to be
18 applied, but every individual, discrete act of
19 application or conduct in the course of application
20 is covered; is that right?

21 ARBITRATOR HARPER: That's the thrust of
22 the question.

1 PROFESSOR HOWSE: Well, in that case, I
2 think that a different aspect of our argument
3 would, as it were, kick in, you know, to preserve,
4 you know, our claim, and that we would say that in
5 that case that the issue is still a matter of
6 interpretation, that this is not in the nature of a
7 jurisdictional bar, and one would still need to
8 consider, as with perhaps, to use an example, an
9 exception under the services chapter of NAFTA some
10 exceptions under the GATT like Article 20, we would
11 have to go ahead and consider whether this as an
12 exception applies so as to interpret the agreement
13 to justify or save as it were the United States's
14 conduct from being scrutinized under Chapter 11.

15 So, insofar as the four corners of this
16 proceeding are concerned with respect just to the
17 issue of jurisdiction, whether there is a
18 jurisdictional bar imposed, the answer would be our
19 claim would remain exactly the same. This does not
20 impose a jurisdictional bar because of its
21 structure and wording, but rather requires
22 application within the adjudication of the merits.

1 And granted, that application might well be
2 affected if the Tribunal were to come to the
3 conclusion that not only normative material is
4 involved, but every individual discrete act in the
5 application or administration of the law.

6 ARBITRATOR HARPER: Mr. President, I'm
7 ready to return to the issue of the Byrd Amendment,
8 if that would suit the pleasure of the Tribunal.

9 PRESIDENT GAILLARD: Certainly.

10 ARBITRATOR HARPER: I believe we left
11 pending yesterday the factual circumstances,
12 whatever they may be, surrounding the Byrd
13 Amendment, and I would look forward to being
14 enlightened on that matter by the United States.

15 MS. MENAKER: Thank you, and good morning,
16 Mr. President, members of the Tribunal.

17 The question that was left pending, I
18 believe, is that you asked the United States
19 whether notification of the Byrd Amendment had been
20 given pursuant to Article 1902, and we have checked
21 into that and can confirm that no such notification
22 was given. That being said, I would like to make

1 three comments on that issue.

2 The first is it is questionable whether
3 such notification would have been required pursuant
4 to the terms of Article 1902. If you read the
5 language of 1902, it states in 1902(1) that each
6 party reserves the right to apply its antidumping
7 law and countervailing duty law to goods imported
8 from the territory of any other party.

9 1902(2) then states that each party
10 reserves the right to change or modify its
11 antidumping law or countervailing duty law,
12 provided that, in the case of such an amendment,
13 and then it goes on to have the notification
14 requirement.

15 There is at least a question as to whether
16 the notification requirement would apply with
17 respect to the Byrd Amendment insofar as that was
18 deemed to be a statute, not necessarily concerning
19 or an amendment, not with respect to the goods
20 imported from the territory, but rather with
21 respect to the distribution of the monies collected
22 or the duties collected on the importation of those

1 goods. So, that is at least, I believe, an open
2 question as to whether that notification provision
3 would be applicable in that regard.

4 Now, that being said, I would also like to
5 note that there is no question in this case that
6 our NAFTA parties did have actual notice of the
7 Byrd Amendment as it was widely publicized, and it
8 was challenged, as you all know, before the WTO.

9 And finally, I would just note that even
10 if the notification provision did apply and it has
11 a specific notification requirement, it does not
12 have a requirement of actual notice. So, the
13 United States could very well be in technical
14 violation of this Article, and for that, if that is
15 the case, then we do apologize.

16 But that being said, again I repeat what I
17 said yesterday, which is that the issue of whether
18 or not notification was given has no bearing on the
19 correct interpretation of Article 1901(3). Canfor
20 itself, on day one of this hearing, said, and I
21 would quote from the transcript on page 248, line
22 six, and Mr. Landry said, quote, Well, I think the

1 position of Canfor is that--it is, referring to the
2 Byrd Amendment--clearly a matter that relates to
3 the antidumping and CVD regime that they have in
4 place, end quote.

5 So, that being said, any obligation
6 imposed on the United States with respect to the
7 Byrd Amendment would fall within--would be barred
8 by Article 1901(3), and the fact that not--no
9 notification was given of this amendment cannot
10 change the characterization of that amendment. And
11 as I noted yesterday, if one were to proceed down
12 that line, it would lead to the really incongruous
13 result whereby a party simply by failing to give
14 notification, technical notification pursuant to
15 the rules in this chapter, could thereby prevent
16 its statute from being characterized as an
17 antidumping or countervailing duty statute, and
18 could then get around all of the obligations set
19 forth in Chapter 19 that the parties have agreed to
20 apply with respect to their antidumping and
21 countervailing duty statutes.

22 PRESIDENT GAILLARD: Ms. Menaker, what

1 would you say about the intention, the legislative
2 intention, the rationale of the Byrd Amendment with
3 respect to antidumping law and countervailing duty
4 law?

5 MS. MENAKER: If I may have a moment?

6 PRESIDENT GAILLARD: Of course.

7 (Pause.)

8 MS. MENAKER: Mr. President, if it would
9 be okay with the Tribunal, I would like at a break
10 to consult with some of our colleagues from the
11 other agencies who are more familiar with the
12 legislative history on the amendment than we are
13 here.

14 PRESIDENT GAILLARD: That's perfectly
15 acceptable.

16 MS. MENAKER: Thank you.

17 PRESIDENT GAILLARD: Mr. Harper, you may
18 proceed.

19 ARBITRATOR HARPER: Thank you,
20 Mr. President.

21 In light of the comment made by
22 Ms. Menaker, let me turn to the Canfor

1 representatives and inquire whether the position
2 articulated by Mr. Landry and quoted by Ms. Menaker
3 a moment ago is still the position of Canfor.

4 (Pause.)

5 PROFESSOR HOWSE: If you will excuse me,
6 Mr. Harper, it would be easier for me if you would
7 phrase what your understanding was of what
8 Ms. Menaker was saying, just so we don't filter
9 this through different understandings of her actual
10 words. I beg your indulgence on this.

11 ARBITRATOR HARPER: Ms. Menaker, would you
12 be good enough to give me the transcript citation,
13 please, again.

14 MS. MENAKER: Certainly. It is page 248,
15 line six. Yes, from the first day.

16 ARBITRATOR HARPER: Professor Howse, just
17 to respond to your query, my question is this: Is
18 it Canfor's position that the Byrd Amendment
19 clearly is a matter that relates to the antidumping
20 and CVD regime?

21 PROFESSOR HOWSE: Well, let's go back to
22 Canfor's claim. Canfor's claim is that--and I

1 elaborated a little bit on this yesterday in
2 response to some questions from the President of
3 the Tribunal. Canfor's claim is very much focused
4 on the Byrd Amendment as the context for--as the
5 context for abusive use of the AD/CVD process, and
6 that relates to the petitions and the argue--in
7 fact, Ms. Menaker herself picked up on this, the
8 idea, and we would prove this--we would have to
9 prove this, we realize, on the merits, that the
10 existence of the Byrd Amendment was the context for
11 getting together a petition creating incentives to
12 have a petition go forward without what would
13 normally be required as genuine consent and support
14 of the petition itself; in other words, the view
15 that the practices are unfair by the industry. And
16 my colleagues will elaborate on that more in the
17 Statement of Claim.

18 I mean, certainly, we would view the Byrd
19 Amendment as the context for this abusive behavior
20 in the beginning of the petition and the ultimate
21 imposition of very, very costly measures on Canfor.

22 This being said, we have to distinguish

1 that from the characterization of the law itself.

2 PRESIDENT GAILLARD: But when you referred
3 to the costly measures, you're talking about
4 antidumping measures and countervailing duty
5 measures; is that correct?

6 PROFESSOR HOWSE: But also including the
7 disruption to Canfor's legal security from the
8 initiation--

9 PRESIDENT GAILLARD: As a result of those
10 measures.

11 PROFESSOR HOWSE: Even before the measures
12 by the result of the process beginning because
13 often in these situations a business starts to be--

14 PRESIDENT GAILLARD: In that case, in
15 anticipation of those measures?

16 PROFESSOR HOWSE: Yes, exactly. In
17 anticipation, yes.

18 ARBITRATOR HARPER: Have you finished your
19 answer?

20 PROFESSOR HOWSE: Well, only to say that
21 the law itself, however, the United States, as far
22 as we can see, had clearly characterized before the

1 WTO as having nothing to do with the administration
2 of antidumping and countervailing duty law, the law
3 itself. That's how they characterized the law
4 itself.

5 And that may be an appropriate
6 characterization of the law itself, and then we
7 would have to look at the nature of the conduct out
8 of which--from which that law is the context and
9 the specific meaning in Canfor's claim.

10 ARBITRATOR HARPER: Do I understand
11 Canfor's position to be, Professor Howse, that the
12 Byrd Amendment is tied to the allegedly prohibitive
13 duties imposed upon Canfor? And in asking that
14 question, I specifically refer you to paragraphs
15 141 through 146 of the Statement of Claim.

16 (Pause.)

17 MR. LANDRY: Mr. Harper, as you have
18 heard, and as is indicated in our written material,
19 the Byrd Amendment is part of the factual matrix
20 within which the claim obviously is based. And one
21 of the things that you have heard both from us and
22 from Ms. Menaker is that there is an allegation

1 relating to how, given the Byrd Amendment, that
2 affected the Commerce's determination on whether or
3 not to initiate the proceeding, whether or not it
4 had sufficient support for the petition, which is
5 required under the domestic law, and the allegation
6 will be, and we will be providing evidence that, as
7 a result of that law being in place, it provided an
8 incentive to members of the domestic industry to
9 support the petition, because if they did not
10 support the petition and duties were put in place,
11 their domestic competitors would get monies back
12 and they would not. And there will be specific
13 evidence brought before the Tribunal to show that.

14 So when you say that is it--if I may
15 just--I want to go back to your question, is it
16 tied to the alleged prohibitive duties, it is part
17 of the factual matrix within which the claim is
18 made.

19 PRESIDENT GAILLARD: Mr. Landry, would
20 that be, on counsel's side, the answer to the
21 question I asked a moment ago to Ms. Menaker, what
22 is the rationale of the Byrd Amendment? You say

1 it's to provide an incentive to the local industry
2 to support--to support what?

3 MR. LANDRY: To the local industry to
4 support a petition going to--

5 PRESIDENT GAILLARD: Petition to do what?

6 MR. LANDRY: I'm sorry, a petition to
7 initiate an antidumping and countervailing duty
8 investigation.

9 PRESIDENT GAILLARD: That's your answer to
10 my question, to the rationale. I mean, that's the
11 rationale of I understand it of the Byrd Amendment.

12 MR. LANDRY: Rationale by the United
13 States?

14 PRESIDENT GAILLARD: Yes. Why have they
15 adopted the Byrd Amendment?

16 MR. LANDRY: Why has the United States
17 adopted the Byrd Amendment?

18 PRESIDENT GAILLARD: Right. It's a simple
19 question. I mean, why? Maybe to put it in--let's
20 not use the word rationale which may seem narrow,
21 for which reasons the United States, in your
22 contention, adopted the Byrd Amendment.

1 MR. LANDRY: I defer to Professor Howse on
2 this, please.

3 PROFESSOR HOWSE: I think the slight
4 hesitation you heard, Mr. President, is that it's
5 possible that there might have been several
6 purposes that were in legislators' minds. We would
7 maintain that this was one of them, but it might
8 not be the only one. However, we would
9 maintain--we will maintain and prove that this
10 was--if it's the purpose that for which it was used
11 in relation to the conduct towards Canfor.

12 PRESIDENT GAILLARD: So, in your
13 contention, this rationale--there may be others,
14 but this rationale is the one which harmed you in
15 this particular case, assuming that you're right on
16 the facts and that on the merits that you're right;
17 right?

18 PROFESSOR HOWSE: It's not--the only
19 rationale on which we could be harmed--in the
20 Statement of Claim we also mention the possibility
21 that our competitors would be provided with
22 payouts. In other words, the duties would be paid

1 to our competitors, and that possibility
2 represents, in our submission, a form of
3 discrimination that's prohibited under the
4 standards of Chapter 11. So, that rationale also
5 pertains to our claim that Canfor has--suffers harm
6 in consequence of a Chapter 11 violation.

7 And, of course, the question we will have
8 to answer on the merits will be has that harm
9 crystallized in the sense of has this happened yet,
10 and does the harm only flow from when the payments
11 are made but from the influence on economic actors
12 of the expectation that such payments will be made,
13 including the pressure to settle this kind of
14 matter through the kind of agreement that Canada
15 and the U.S. had at various points in time in the
16 past?

17 MR. LANDRY: Mr. President, may I
18 just--you're asking--you're using the word
19 rationale, and we are responding to the word, if I
20 may, to the word effect, the effect that the Byrd
21 Amendment--the rationale of the United States as to
22 why it implemented the Byrd--put in place the Byrd

1 Amendment. When I say that it has received a lot
2 of press and a lot of discussion would be an
3 understatement, but the rationale is one thing.

4 The effect of the Byrd Amendment in the
5 context of the softwood lumber dispute is that it
6 provides an incentive, et cetera, et cetera.

7 The Byrd Amendment per se, which creates a
8 situation, in effect, in the end where the playing
9 field is no longer level anymore, it's in favor of
10 the domestic industry because of the way in which
11 it's done. You take your duties and you give the
12 duties back to the domestic industry. It's just
13 been described by a number of different people. I
14 will use words as blatantly protectionist.

15 But that's getting into the rationale.
16 The effect on Canfor in this case for the purposes
17 of this is as we have indicated.

18 PRESIDENT GAILLARD: I take your point.
19 It's very well put. So, you're saying to me, I put
20 it in my own words, you say to me the rationale is
21 subjective and it's always hard to reconstruct the
22 rationale, but the effect is objective, and the

1 effect which you say harms you is to provide an
2 incentive--it does incentivize the local industry
3 in the context of putting pressure on the
4 authorities to chase you for antidumping and
5 countervailing duties. Would that be a fair
6 summary of what you said?

7 MR. LANDRY: It would be, and let me
8 just--I want to make sure this point is very clear
9 on the record because it is one of the effects of
10 the Byrd Amendment which is incredibly contrary, in
11 my submission, to the whole concept of what
12 antidumping and CVD matters are about, and it's
13 this. We now have approximately, I think we heard,
14 Mr. President, \$3.8 billion, \$4 billion. The
15 effect of the Byrd Amendment, if it goes through to
16 fruition, is that it creates a situation where that
17 \$4 billion goes out to the domestic industry to
18 effectively be used by the domestic industry in
19 competition with, for example, Canfor. You can
20 just see by using that analogy we go back to day
21 one before it starts that there is an incredible
22 incentive for the domestic industry to be

1 supporting a petition because if they don't support
2 the petition, they don't get part of the duties.

3 PRESIDENT GAILLARD: From the factual
4 standpoint, a simple question doesn't mean
5 anything, it's just to get the facts right.

6 We heard yesterday on the respondent's
7 side they say it's not been used yet. Your answer
8 to that is what? Yes, it's true, but the very
9 existence of that device already creates harm
10 because--the expectations of the market and all
11 that, I mean, the existence of that tool, even if
12 not used yet in and of itself creates harm to
13 Canadian exporters?

14 MR. LANDRY: Technically, the United
15 States is correct. It has not paid out any duties
16 under the softwood lumber dispute as of yet, but
17 the effect that it had at the beginning and--we
18 will provide evidence to that effect--of allowing
19 or effectively incenting people to come forward to
20 support the petition has been a serious effect and,
21 therefore, serious harm has resulted to Canfor.

22 PRESIDENT GAILLARD: Thank you very much.

1 I understand the contention.

2 ARBITRATOR WEILER: I would like a
3 clarification on one issue on this. I understand
4 this point made, but as Mr. Harper pointed out,
5 assume the panel does not take--and it's just an
6 assumption--the same view on the meaning of
7 antidumping law that Canfor is pressing on us, and
8 that it includes, for example, something that is
9 like measures, et cetera, and therefore it could be
10 consequential how the Byrd Act itself is
11 characterized, and from all this discussion I have
12 what your statement in page 246 which you said
13 Canfor, the position of Canfor is that it clearly
14 is a matter that relates to antidumping and CVD
15 regime, and now the responses that you have given,
16 if I hear you correctly, seem to confirm that, and
17 therefore no matter what effect it might have, the
18 question is whether your characterization--because
19 we know the United States, you argued in your
20 Statement of Claim that the United States before
21 the WTO said it has nothing to do with the WTO, but
22 we have here the respondent, the United States,

1 saying it is the CVD measure. It's an amendment to
2 the 1930 statute which might just mean that they
3 made a misstatement before the WTO. It could be
4 that they made a misstatement, but this panel has
5 to decide objectively on its own terms what is the
6 correct characterization, and here it seems to be
7 that both of you, Canfor and the United States
8 respondent, are agreeing that this is a
9 countervailing duty measure independently of what
10 the United States said before the WTO which might
11 have some probative value but is certainly not
12 conclusive. They just might have made a
13 misstatement there, whatever its nature.

14 MR. LANDRY: I'm going to try to answer
15 quickly and then I'll transfer it to Professor
16 Howse, but at a very essential level, Professor
17 Weiler, what the position that we were taking
18 yesterday was that the Byrd Amendment cannot have
19 the protection provided under 1901(3) because it is
20 obviously not the type of law that was contemplated
21 by the parties under 1902(2)(d). It is--not only
22 was there not any notice given--that's one

1 thing--but the fact of the matter is it is
2 blatantly contrary to their WTO obligations under
3 the--under the antidumping and subsidies codes.
4 And therefore--

5 PRESIDENT GAILLARD: Mr. Landry, if I can
6 interrupt you, if that is true, and if the Byrd
7 Amendment falls--I'm just hypothesizing, correct me
8 if I'm wrong--and if the Byrd Amendment does fall
9 into 1902 and it has not been notified yet so
10 presumably no statute of limitation applies, and
11 it's grossly against the WTO rules, isn't it the
12 case there is a device to challenge it yet, or what
13 would be your contention on this? Is there room
14 for challenge of the Byrd Amendment pursuant to the
15 very rules of Chapter 19, even today?

16 MR. LANDRY: May I have a moment.

17 PRESIDENT GAILLARD: That's a question you
18 can take time to think about it.

19 MR. LANDRY: Professor Howse will respond
20 to that.

21 PROFESSOR HOWSE: Well, Mr. President,
22 it's true, and Canada could challenge it at the

1 WTO, Canada, not the Ambassador.

2 PRESIDENT GAILLARD: I understand. I'm
3 sorry if I misspoke. I don't know how I phrased
4 question, but you would have to pressure Canada to
5 protect you with that device. But assuming Canada
6 was willing to do it, what would be your, you, as
7 an expert, to the possibility or the feasibility of
8 that kind of faction initiated by Canada pursuant
9 to Chapter 19 devices?

10 PROFESSOR HOWSE: Canada could, under--I
11 suppose what you're referring to is under review of
12 statutory amendments 1903. You could challenge the
13 Byrd Amendment as a violation of 1902(2). I think
14 that's correct.

15 PRESIDENT GAILLARD: I would have assumed
16 it's contained in your allegations because you say
17 it's contrary to the WTO. It's something which
18 falls under the Chapter 19 ambit because it
19 provides, even if it's not the intention, the
20 result is to provide the strong incentive to make
21 the antidumping law and countervailing duty laws or
22 actions or enforcement of those laws much more

1 stringent, and therefore much more difficult for,
2 say, Canadian investors or Canadian exporters. I
3 don't mean to qualify the situation here any
4 further, but if that's true, it seems to me that
5 Canada would still have an action under Chapter 19,
6 but maybe there is a statute of limitation problem
7 or anything.

8 But my initial sense, and I'm not at all
9 an expert in these matters, would be that if notice
10 has not been given, maybe the statute of
11 limitation, if any, has not started to run.

12 So, I would like your determination on
13 that, and in a moment I would like the
14 determination of the respondent on this. You may
15 want to think about it a little while before you--I
16 don't mean a top-of-your-head answer. You may want
17 to think a little bit.

18 ARBITRATOR WEILER: On a related issue
19 that I'm not clear on, I understood Canfor's claim
20 on the Byrd Amendment to be as follows: Here is a
21 statute which injures investors, and let's say we
22 assume that is correct, and here is a statute that

1 by the very statement of United States has nothing
2 to do with CVD and antidumping. And then you could
3 say and we think the United States is right, it has
4 nothing to do with CVD and antidumping, and
5 therefore, whatever way you interpret the reach of
6 1901(3), the Byrd Amendment stands because the
7 United States itself claims it has nothing to do
8 with CVD and antidumping, so there is no issue, and
9 it's causing injury to an investor, jurisdiction
10 established.

11 But, in fact, what we find now is that the
12 United States, the respondents are saying no, no,
13 it has nothing absolutely to do with CVD and
14 antidumping. It's a formal amendment to the very
15 statute, the 1930 statute, and sorry, we should
16 have notified it, we didn't notify it, but that
17 doesn't change its character as a CVD antidumping.

18 PRESIDENT GAILLARD: It seems that at this
19 stage both parties agree on that.

20 ARBITRATOR WEILER: And Canfor in the
21 statement of Mr. Landry is saying we think it has
22 relatedness, everything to do with--and when

1 Mr. Harper invites him to say he might have said I
2 misspoke, that was a misstatement, but you're
3 profound. You say, no, no, that has everything to
4 do with it. That's the clarification I'm seeking.

5 So, both parties seem to be agreeing, and
6 the only point is that maybe the United States made
7 a misstatement in good faith or in bad faith--it's
8 not for us to determine--the way they characterized
9 it before the WTO.

10 But that it seems as if both parties are
11 agreeing that this is not--this measure is not as
12 it was characterized by the United States before
13 the WTO. That's the clarification I seek.

14 PRESIDENT GAILLARD: Can I state the
15 position of the parties as I see it now, and you
16 tell me if you agree or not. It seems to me that
17 in terms of ambit of what is covered by Chapter 19,
18 there is an agreement.

19 Now, the dispute, therefore, broke down to
20 the argument on what is the true construction of
21 1901(3). So, if you prevail on your construction,
22 everything, including the Byrd Amendment, will be

1 under Chapter 19 and Chapter 11 because the same
2 matrix can be characterized as different--as
3 different--as having different consequences under
4 different bodies of rules, and that's your whole
5 argument.

6 And if you lose on your interpretation of
7 1901(3), then you lose also in the Byrd Amendment.
8 That's how I see it in terms of how the questions
9 are presented to us, but I certainly would like
10 both parties to confirm or infirm this
11 understanding and if you do infirm this
12 understanding, tell us why. Maybe claimant first
13 and then obviously we will hear defendant on this
14 very same issue.

15 PROFESSOR HOWSE: Mr. President, members
16 of the Tribunal, we have a situation here where the
17 use of words is obviously extremely important, and
18 we welcome the chance to be as clear as possible.
19 Canfor is maintaining that the Byrd moment has had
20 certain effects on Canfor. Those effects have
21 occurred in the context of an antidumping and CVD
22 proceeding.

1 We are also maintaining, however, that
2 even though the effects have occurred through those
3 proceedings, the Byrd Amendment is not an
4 antidumping and countervailing duty law. Its
5 rationale, in fact, in our submission, is contrary
6 to the purposes of antidumping and countervailing
7 duty law which are effective and fair disciplines
8 and unfair trade practices which was the expression
9 in 1902(2).

10 So, there is a sense in which the effects
11 felt by Canfor have come through a process, an
12 antidumping and countervailing process, but the law
13 itself is not consistent with the meaning of a
14 countervailing and antidumping duty law
15 under--consistent with the purposes of NAFTA.

16 PRESIDENT GAILLARD: Isn't it fair to say
17 that you say that it is an illegal antidumping and
18 countervailing duty law?

19 PROFESSOR HOWSE: Yes.

20 PRESIDENT GAILLARD: It is an antidumping
21 and countervailing duty law which is against
22 international law, against the GATT, against the

1 applicable rules of international or possibly even
2 domestic law which, in your view, apply. Is that a
3 fair characterization?

4 PROFESSOR HOWSE: There is a normative
5 dimension in the meaning of antidumping and
6 countervailing duty law in Chapter 19 in that the
7 meaning of the expression is not meant to encompass
8 anything however intrinsically unrelated to the
9 true purposes of antidumping and countervailing
10 duty law that might be labeled as such. So that
11 determining that--

12 PRESIDENT GAILLARD: That's what make it
13 illegal, in your view; correct?

14 PROFESSOR HOWSE: Right, but in describing
15 it as illegal antidumping and countervailing duty
16 law, what we are saying is then it's not genuine.
17 It's mislabeled or it's not real as countervailing
18 and antidumping duty law.

19 PRESIDENT GAILLARD: It remains that in
20 practice the harm which you suffer--according to
21 you, I'm not judging anything on the merits or
22 prejudging anything on the merits, obviously--is

1 the harshening to use a layman's term, harshening
2 of the countervailing duty and antidumping laws; is
3 that correct? By the very--it may not have been
4 the goal, but by the very presence of the Byrd
5 Amendment. Almost a mechanical result.

6 PROFESSOR HOWSE: In our submission, it
7 would be not the harshening of the law, but the
8 hijacking or misappropriation of the regime.

9 PRESIDENT GAILLARD: Should replace regime
10 by law, and my proposal would be correct?

11 PROFESSOR HOWSE: That the harm to Canfor
12 has come through the tools that this nonantidumping
13 and countervailing duty law offers to officials to
14 misuse the antidumping and countervailing duty
15 process.

16 PRESIDENT GAILLARD: Thank you very much.
17 That's perfectly clear.

18 Now, I think at this juncture, we should
19 provide an opportunity--unless you want to
20 comment--I would like the respondent to be able to
21 comment on this.

22 MR. LANDRY: I didn't think we answered

1 Professor Weiler's question.

2 PRESIDENT GAILLARD: If you have an answer
3 to the question, please do.

4 MR. LANDRY: Professor Weiler, the
5 reference in the transcript, I would only ask you
6 to look through the context of the reference
7 because there was discussion somewhat of some of
8 the issues that we are talking about, but we are
9 not here to resile from my comment. You know,
10 this, unfortunately, is a situation similar to
11 other issues that had been raised in this lawsuit.
12 This is a labeling of convenience extraordinaire.
13 And at one moment when they're before the WTO when
14 it's in their favor to say it is not an and CVD
15 law, they say it's not an antidumping and CVD law.
16 Now they say it is an antidumping and CVD law
17 because it helps them. It is part.

18 What I say, you cannot look at the Byrd
19 Amendment in my submission and in good faith say
20 that it does not relate in some way to the
21 antidumping and CVD regime that is in place in the
22 United States. You can't. But for the purposes of

1 our argument, we say that given the context of
2 Article 1902 and 1901(3), it is not a law that can
3 receive the protection that the United States has
4 suggested it should receive in this case.

5 PRESIDENT GAILLARD: My question to the
6 U.S. has to do with precise situation of the Byrd
7 Amendment with respect to the Chapter 19
8 mechanisms. One, would a challenge of the Byrd
9 Amendment pursuant to the Chapter 19 devices still
10 open to Canada or would it be time-barred for
11 reason or another? And two, could it be--would
12 that be an option offered to Canada--I'm talking
13 about from a procedural standpoint. I'm not
14 talking about from a merits standpoint. You may
15 say yes, it falls under this, this--the structures
16 or the mechanisms which are designed by Chapter 19
17 and, of course, on the merits it would be perfectly
18 fine, and we would prevail, but I'm talking in
19 terms of jurisdiction. And you don't have to
20 answer right now, but you may want to think about
21 it.

22 MS. MENAKER: I apologize to the Tribunal

1 because we do our best to answer all of the
2 questions put before us, but I hope that you will
3 understand that I cannot be placed in a position
4 where I am inviting litigation against the United
5 States, and so I cannot be here and say yes, Canada
6 could challenge the Byrd Amendment under Chapter
7 19, whether we would have the procedural defense or
8 not or whether that is time-barred. We are here
9 defending this case, and I have not looked into
10 that possibility, and I would not want to prejudice
11 any of the United States's rights in that regard,
12 and I fear that by answering that question in any
13 respect I might be placing us in that position.

14 PRESIDENT GAILLARD: That's perfectly
15 fair. On the other hand, we are here to understand
16 whether or not we, the Chapter 11 Tribunal, have
17 jurisdiction, and you say no, no, no, because it
18 falls under Chapter 19, so I'm pressing the point
19 and saying what about Chapter 19, and you said you
20 don't want to answer. That's fine, but it leaves
21 us with a less powerful argument on your side than
22 if you were to say the very reason 1901(3) offers a

1 shield is because precisely there are procedures
2 which may be used, and if they have not been used,
3 so be it. I don't mean to be unfair to your
4 litigation strategy, and that's fine. I understand
5 it.

6 MS. MENAKER: I understand.

7 PRESIDENT GAILLARD: You understand my
8 question is not to put you in a bad position with
9 Canada or anything like that. It's just to
10 understand the rationale and the limits, if any, of
11 your argument.

12 MS. MENAKER: I do understand, and I would
13 reemphasize that in our view, any challenge to all
14 of the claims that Canfor is bringing are barred by
15 Article 1901(3). And Article 1901(3), you will
16 recall, says no provision of any chapter shall be
17 construed as imposing obligations on a party with
18 respect to its antidumping law or countervailing
19 duty law, and we have argued at length that all of
20 their claims fall within that bar.

21 Article 1901(3) does not state that no
22 provision of this chapter shall be construed as

1 imposing obligations on a party with respect to
2 matters that are subject to dispute resolution
3 under this chapter. It could have said that. It
4 doesn't.

5 Now, the fact is that we have been
6 discussing Canfor's claims they all turn on the
7 antidumping and countervailing duty determinations
8 that have been issued, and we have said repeatedly
9 that those are issues for a Chapter 19 panel, and
10 that is to, I'm showing you how the Treaty works,
11 but then again for some of its claims it is
12 challenging the preliminary determinations. We
13 have not said that those would be proper matters to
14 be challenged under Chapter 19.

15 And, in fact, we have said that under
16 Article 1904 a Chapter 19 Tribunal would not have
17 jurisdiction to entertain a challenge to a
18 preliminary determination.

19 So, our defense does not fall on whether
20 the matter can be litigated by a Chapter 19 panel,
21 just as the fact that challenging the preliminary
22 determinations in a Chapter 11 proceeding would

1 impose an obligation on the U.S. with respect to
2 its AD/CVD law that is quite independent from the
3 fact that those same determinations cannot be
4 challenged under Chapter 19.

5 So, in that regard, I think that your
6 question, the fact that we cannot provide an answer
7 to that question does not affect at all our defense
8 under Article 1901(3).

9 PRESIDENT GAILLARD: I understand that,
10 but also you will remember that we discussed
11 extensively the argument of potential duplication
12 or not, and that may be relevant in that
13 discussion, that's all.

14 ARBITRATOR WEILER: I want to add
15 something because my failing memory, and I
16 apologize for it, I recall a conversation between
17 you and I where I suggested that the construction
18 you were putting on it, especially since one of the
19 definitions also referred to possible future
20 amendments to antidumping law that your
21 construction of 1901(3) would give a shield to a
22 member, Canada, United States, Mexico, to pass

1 antidumping legislation which would compromise
2 other rights and duties covered by the NAFTA, and
3 they would be shielded because you said you could
4 not even dispute them under Chapter 20, a dispute
5 could not dispute them under Chapter 20.

6 And your reply to me if I remember
7 correctly, and I apologize in advance because I'm
8 the first to suspect my memory, was no, there is a
9 protection there because of the duty of
10 notification and the possibility to review it under
11 the duty of notification. And I didn't have the
12 Byrd Amendment in mind. Now that this hasn't taken
13 place, and when the Chairman asks you, but would it
14 still be open, you're saying I'm not going to
15 answer on this. I think it's germane to that
16 conversation we had. It's germane because just as
17 a minute ago we said to Canfor we might not buy
18 into your interpretation of 1901(3) as you would
19 like us, we have to tell the United States we might
20 not buy into your interpretation of 1901. We think
21 it's a provision that calls for interpretation, and
22 this issue is germane to how we will interpret it.

1 So, if you don't reply in one way or
2 another, the Tribunal just takes note of that.

3 PRESIDENT GAILLARD: Just to be clear, we
4 have no interpretation in mind at this stage as a
5 tribunal. We are just hypothesizing to get your
6 reactions. It goes without saying.

7 MS. MENAKER: Well, with those comments in
8 mind, at our next break, I will consult and see if
9 we can offer any more information to the Tribunal
10 in this regard.

11 PRESIDENT GAILLARD: Thank you,
12 Ms. Menaker. That will be useful, and of course it
13 goes for both parties.

14 Shall we carry on on a different type of
15 questions?

16 ARBITRATOR HARPER: I think not, Mr.
17 President, with respect. I have enjoyed the
18 colloquy, but actually I was pursuing a line of
19 inquiry, which I should like to pursue if I may.

20 PRESIDENT GAILLARD: Please do.

21 ARBITRATOR HARPER: Let me see, directing
22 my inquiry to Canfor, whether I can, in my approach

1 of the world of being two plus two equals four,
2 understand where we are. Article 1902 recognizes
3 that a party can apply its antidumping law and
4 countervailing law, countervailing duty law, and it
5 can change or modify such law. That's what it says
6 on its face.

7 I think it's common ground between the
8 parties that the United States did pass an
9 amendment called the Byrd Amendment to its
10 antidumping and countervailing duty law.

11 Does Canfor agree with that?

12 MR. LANDRY: Well, technically,
13 Mr. Harper, and again we are straying a little bit
14 here, so I'm going from my memory. Technically,
15 the Byrd Amendment was not passed as amendment to
16 what has been defined as the antidumping and
17 countervailing duty law statute. Technically, it
18 wasn't. It was an add-on to a--I'm using my
19 terminology, it may be totally inappropriate in the
20 United States context. My understanding was like
21 an omnibus bill where an amendment was the
22 so-called Byrd Amendment--that's what everybody

1 calls it--was put in there.

2 ARBITRATOR HARPER: May I inquire of the
3 United States what its position is on that?

4 MS. MENAKER: That may have been the
5 vehicle through which the amendment was brought to
6 the floor of the Congress. However, the actual
7 legislation is an amendment to Title VII of the
8 Tariff Act of 1930.

9 ARBITRATOR HARPER: That's what I
10 understand. I would appreciate Canfor's looking
11 into the matter to satisfy itself because I do
12 think this is one of those issues where it either
13 is or is not the case that in the statute books of
14 the United States this is or is not an amendment to
15 antidumping or countervailing duty law. So, I
16 would appreciate Canfor's consulting on that matter
17 and advising the Tribunal as to whether or not it
18 agrees with what the United States has just said.

19 PROFESSOR HOWSE: We may, after
20 discussions among ourselves, say something more
21 about this, Mr. Harper, but with respect, we view
22 the question as a bit more complex because, again,

1 our view is all words have to be taken in context.
2 So, here we have the expression change or modify
3 antidumping law or countervailing duty law, and the
4 possibility that some such changes or modifications
5 maybe are legal, of course, under NAFTA and some
6 might be illegal, if they don't meet the
7 conditions.

8 So, on the one hand, if we read words in
9 context, we might say that it's possible that for
10 purposes of applying 1902(2) and testing whether a
11 given legislative action could result in a new
12 amended legitimate antidumping or countervailing
13 duty law, that we will characterize what is
14 purporting to be done as a change or modification
15 to antidumping or countervailing duty law while on
16 the other hand let's say it's illegal for--an
17 illegal change might well be characterized for
18 purposes of 1901(3), an exceptions provision, as
19 not antidumping or countervailing duty law because
20 there may be a normative dimension to the meaning
21 of that expression in the context of 1901(3),
22 whereas in 1902(2) where you're trying to test

1 these changes or modifications to determine whether
2 they're genuine and legitimate as permissible
3 antidumping or countervailing duty law, you would
4 use those words slightly differently.

5 And as I say that's without prejudice to
6 some additional comments we may have, but just to
7 suggest how we would begin, how we would analyze
8 the issue, that context is so important here in
9 those words, and those words may mean something
10 slightly different when they are the object of
11 verbs change or modify than when they appear in a
12 provision that purports to give some kind of safe
13 harbor to something called antidumping or
14 countervailing duty law.

15 ARBITRATOR HARPER: Let me understand
16 something about Canfor's litigation posture in this
17 matter. On the one hand we have a statement in the
18 Statement of Claim. I refer now to paragraph 144
19 sub five which reads, "More particularly, the Byrd
20 Amendment falls below the standard required of the
21 United States under NAFTA Articles 1102, 1103, and
22 1105 in that it ensures that any antidumping or

1 countervailing duties imposed to remedy any proven
2 dumping or to neutralize the impact of
3 countervailable subsidies is overremedied in that
4 the redistribution of such duties distorts the
5 United States marketplace in favor of the domestic
6 United States industry at the expense of Canfor and
7 its investments and those in its position." That's
8 one part of Canfor's allegation in this matter.

9 Another part, if I understand it
10 correctly, is to say that the Byrd Amendment is
11 something other than related to antidumping and
12 countervailing duty law.

13 Under the first proposition, I take it
14 Canfor has to deal with the language of 1901 and
15 1902 which states in substance that a statute has a
16 safe harbor in respect of being litigated anywhere
17 other than under 19, if it's antidumping or
18 countervailing duty.

19 So then that leads to an exegesis on what
20 is a statute, what is a law, what is a normative
21 value, what is a measure. On the other hand, if
22 the Byrd Amendment has nothing to do with

1 countervailing duties or antidumping law, then its
2 relationship to this case is nonexistent in terms
3 of what is in the Statement of Claim. There is no
4 connection. Everything that's in the Statement of
5 Claim related to the Byrd Amendment relates to
6 antidumping and countervailing duty.

7 So, I'm left perplexed, and perhaps the
8 best way to frame a precise question to Canfor is
9 to say, please tell the Tribunal whether you are
10 stating that the Byrd Amendment is or is not a part
11 of the antidumping and countervailing duty law
12 regime of the United States.

13 MR. LANDRY: Could we have one moment?

14 (Pause.)

15 PROFESSOR HOWSE: With respect, we believe
16 that we, perhaps as clearly as we can, already
17 tried to solve this puzzle, and I just referred to
18 what I had said earlier, that the Byrd Amendment in
19 our submission and--and this is consistent--is not
20 part of or is not countervailing and antidumping
21 duty law within the meaning of 1901(3).
22 Nevertheless, and in the conversation that I had

1 with the President of the Tribunal, I thought that
2 we had to some extent clarified this, but I'm happy
3 to go at it again, of course, because we want the
4 Tribunal to be as clear as possible in its own
5 mind.

6 Rather, we have a situation here where
7 harm has been done to Canfor because the Byrd
8 Amendment statute, which is not an antidumping or
9 countervailing duty law has nevertheless given
10 officials certain tools by which to abuse or
11 improperly conduct themselves in the context of
12 antidumping and CVD proceedings, and that's harmed
13 Canfor.

14 So that's our view. So, if you ask us is
15 there a relationship between those proceedings and
16 the law, yes, but the relationship, unfortunately,
17 is one of abuse or misuse in that the
18 countervailing duty laws and antidumping laws and
19 their administration are therefore purposes that
20 are alien to, and indeed are undermined by the Byrd
21 Amendment, which is some different kind of law.

22 Maybe I can give a hypothetical--is this

1 still unclear, Mr. Harper? Do you we still need to
2 clarify further?

3 ARBITRATOR HARPER: I would rather not say
4 how clear it is to me.

5 PROFESSOR HOWSE: Maybe with the
6 indulgence of the Tribunal, I could give a
7 hypothetical outside of the context of this case
8 that might make it clear. Would that be valuable,
9 or maybe not?

10 PRESIDENT GAILLARD: Why don't you give
11 this hypothetical and then we will have a short
12 recess after that. That may be a good time to have
13 a break.

14 PROFESSOR HOWSE: I just to want consult
15 with my colleagues for a second as to whether we
16 really feel this is needed.

17 (Pause.)

18 PROFESSOR HOWSE: After consultation, we
19 really think that even if we were to give this
20 hypothetical, we would be reduced to trying to
21 explain in effect the same distinction that we
22 articulated, and we think we have articulated it as

1 persuasively as we can, if we look at the various
2 statements about the distinction between what might
3 be a law of a certain kind and what might affect
4 the way in which officials improperly conducted
5 themselves in administering a law of some kind.

6 PRESIDENT GAILLARD: Which you articulated
7 well. You are referring to the briefs or to our
8 earlier discussion on the distinction between law
9 and its effects, its de facto consequences?

10 PROFESSOR HOWSE: Both, Mr. President, but
11 I was thinking because it was most immediately in
12 my mind to my responses to some of your questions
13 earlier this morning.

14 PRESIDENT GAILLARD: I thought you would
15 refer to it. Thank you. I understand what you're
16 talking about. Thank you.

17 Well, we will have 15-minutes recess.
18 Thank you.

19 (Brief recess.)

20 PRESIDENT GAILLARD: We go back to the
21 record, thank you.

22 At this stage, we have a question which is

1 addressed to respondent, and we would like to have
2 a formal determination in writing to that question,
3 and you will tell us how long you need to answer
4 that question, if it takes time or not. We can
5 discuss that as a separate issue.

6 On--in answering one of the questions,
7 Ms. Menaker said, and finally, I would just note
8 that even if the notification provision did apply
9 and it has a specific notification requirement, it
10 does not have a requirement of actual notice, so
11 the United States could very well be in technical
12 violation of this Article. And for that, if that
13 is the case, then we do apologize. It refers to
14 the Byrd Amendment and the Article in question is
15 1902(2).

16 The question on which we would like to
17 have the determination of respondent in writing is
18 twofold. One in terms of timing or time frame or
19 time bar or in terms of time, could respondent
20 still notify the Byrd Amendment pursuant to
21 1902(2)? That's the first question. And the
22 second question is: In the affirmative, does it

1 intend to do so at any time?

2 Is the question clear?

3 MS. MENAKER: It is clear, Mr. President,
4 and may I just ask, is there--if we were able to
5 answer this question orally today, would that meet
6 your needs?

7 PRESIDENT GAILLARD: If you were able--I
8 was simply asking you my second question, the
9 timing question so that we would like--we don't to
10 want take you by surprise, or we understand the
11 concern that the U.S. administration may want to
12 coordinate its position talking to various people.
13 It may have been done, but it may not. So, I would
14 like, if you need to talk to various authorities,
15 it's fine with us. In that case, we will give you
16 the time you need. We were thinking of a few
17 weeks. If you need a few weeks, it's not a problem
18 of time.

19 But if you can--maybe we could revisit
20 that after you answer orally today, if it's very
21 clear in the record, it's all right; if there are
22 areas of uncertainty, we may want the determination

1 in writing.

2 We are not saying it's relevant or it's
3 not relevant. It's part of the argument as you
4 yourself recognize, and I quote the citation, it's
5 part of the argument on the consistency and the
6 self-contained character of Chapter 19. And again,
7 we don't prejudge anything as to the relevance. We
8 want to know what the situation is.

9 So, maybe you can answer that now, and we
10 will see at end of this hearing if we need a
11 further written determination.

12 Ms. Menaker.

13 MS. MENAKER: Mr. President, members of
14 the Tribunal, the answer that I can give you now,
15 and you can tell me if this is sufficient for your
16 purposes is that it is our view that there is no
17 time bar or time frame in which the notification
18 needs to take place. The language itself says as
19 far as in advance as possible to the date of
20 enactment, of course, but that does not preclude a
21 party from later notifying.

22 As far as our present intent, the United

1 States is now actively seeking the repeal of the
2 Byrd Act in order to comply with the WTO's
3 decision, so that is being done right now, so that
4 is the action that we have been taking. We will
5 see if that answers your question of whether or not
6 we need to simultaneously while seeking the repeal
7 of the act to actually go through the motion of
8 formally notifying the NAFTA parties that this was
9 enacted.

10 PRESIDENT GAILLARD: What's wrong with
11 the--how long would the repeal take? What form
12 does it take procedurally?

13 MS. MENAKER: It requires legislative
14 action.

15 PRESIDENT GAILLARD: And if the answer is
16 in the negative, would it take the form of some
17 kind of legislative act, saying we maintain, or it
18 will just be nothing and the situation would remain
19 as is?

20 MS. MENAKER: That's my understanding,
21 that the Congress will either repeal the law or--

22 PRESIDENT GAILLARD: Or do nothing.

1 MS. MENAKER: Or do nothing.

2 PRESIDENT GAILLARD: In that case there is
3 no document or no act; is that correct?

4 MS. MENAKER: There may be a record to the
5 extent the--

6 PRESIDENT GAILLARD: In other words, do
7 they have to vote on something to say no, or they
8 just refuse to--you know, we have a law saying no,
9 we don't change it, thank you, or will we have
10 nothing because they don't want to change it,
11 period?

12 MR. CLODFELTER: It depends at what stage
13 how far the legislation progresses. It doesn't
14 come out of committee and never makes it to the
15 floor of either house, for example, then that's one
16 thing, and there would be a record of nonaction I
17 guess on the committee. It makes it to the floor
18 of one of the two the houses and it's not approved,
19 then there would be a record of that vote. But
20 beyond that, I mean, it would just be the history
21 of how the proposal is treated in Congress,
22 basically.

1 PRESIDENT GAILLARD: Thank you,
2 Mr. Clodfelter.

3 Go ahead.

4 MS. MENAKER: I apologize. I did have
5 answers to the other questions that the Tribunal
6 posed before we took our break.

7 PRESIDENT GAILLARD: Why don't you do
8 that, and on this issue regarding the Byrd
9 Amendment, we will tell you at the end of the
10 proceedings today if we need further elaboration on
11 this or not.

12 MS. MENAKER: Thank you.

13 So, I had three points that I wished to
14 make in response to your questions. The first is I
15 would just preface my response by stating that in
16 the United States's view, Canfor's claim is still
17 unclear to us. We have heard, I thought, twice in
18 response to Professor Weiler's questions today that
19 Canfor was relying on the Byrd Amendment as context
20 for its claims, and yet at other times we have
21 heard that they are still relying on the
22 paragraphs, including paragraph 144 and 141 in

1 their Statement of Claim, whereby they are
2 challenging the Byrd Amendment as a measure in and
3 of itself.

4 If, in fact, they are not doing that, and
5 in accordance with their answers to Professor
6 Weiler's questions if they are not challenging the
7 Byrd Amendment as a measure itself, then I think my
8 subsequent answers are irrelevant to the questions
9 that the Tribunal asked regarding whether or not
10 the Byrd Amendment could be challenged under
11 Chapter 19, et cetera.

12 To the extent it's context, I believe I
13 gave our answer orally and in our written
14 submissions, that if what they are challenging is
15 just the effect that it had on the initiation, the
16 decision to initiate the antidumping and
17 countervailing duty investigations, that again goes
18 to the very heart of the administration and
19 application of the U.S. AD/CVD laws and would be
20 barred by Article 1901(3)

21 Now, let me presume, since the record I
22 believe on this is still a bit unclear, that Canfor

1 is retaining its claim that the Byrd Amendment
2 itself is a measure that violates the NAFTA. The
3 two questions that I think you had asked was, one,
4 what was the rationale for the Byrd Amendment's
5 adoption and on that count there is, as far as we
6 are aware, no legislative history for the Byrd
7 Amendment. I don't believe the amendment went
8 through the ordinary process of being marked up by
9 the various committees in the House and the Senate.

10 So, the only indication that we have as
11 far as Congress's intent is concerned are the
12 findings of Congress that are in the statute
13 itself. At the very end of the statute there is a
14 section that says findings of Congress respecting
15 continued dumping and subsidy offset, and I would
16 like to just read to you three sentences from those
17 findings. They are relatively short.

18 One, it says, Congress makes the following
19 findings, quote, Injurious dumping is to be
20 condemned, and actionable subsidies which caused
21 injury to domestic industries must be effectively
22 neutralized, end quote.

1 Then it continues, quote, The continued
2 dumping or subsidization of imported products after
3 the issuance of antidumping orders or findings or
4 countervailing duty orders can frustrate the
5 remedial purpose of the laws by preventing market
6 prices from returning to fair levels.

7 And finally, quote, United States trade
8 laws should be strengthened to see that the
9 remedial purpose of those laws is achieved, end
10 quote.

11 So, I did not quote the findings in their
12 entirety, but those, I think, are the relevant
13 portions that give an indication as to
14 congressional intent.

15 PRESIDENT GAILLARD: Remind me. Is that
16 in the record, and if yes, what is the exhibit
17 number?

18 MS. MENAKER: I do not know, but we will
19 find out if it is in the record. I don't believe
20 that the United States submitted it, but if Canfor
21 is challenging the Byrd Amendment as a measure, I
22 would think that it would have submitted it.

1 PRESIDENT GAILLARD: Please let us know
2 because I don't recall, but I may be wrong.

3 MS. MENAKER: Okay.

4 And finally, in response to the Tribunal's
5 question whether Canada could have challenged the
6 Byrd Amendment pursuant to Article 1903, I did have
7 a chance to consult, and it is our view that yes,
8 indeed, they could have. They did not do that.
9 They did institute, initiate Chapter 19 proceedings
10 challenging the determinations, but they could have
11 challenged the amendment to the law pursuant to
12 Article 1903. With that said, again, I would like
13 to reiterate that the United States is currently
14 actively seeking the repeal of that law in order to
15 bring ourselves into compliance with the WTO's
16 decision.

17 PRESIDENT GAILLARD: Leaving that aside,
18 that last comment aside, is it your view that
19 Canada would be time-barred to do it at this stage?
20 Or would you give the same answer as for your
21 notification?

22 MS. MENAKER: We don't believe that there

1 is any such time bar to bringing the claim under
2 Article 1903.

3 PRESIDENT GAILLARD: The second question:
4 What is your contention as to the possibility by a
5 NAFTA Party, capital P, to challenge the statute
6 which falls under Chapter 19, using 1903, I
7 believe, 1903 when such statute has not been
8 notified pursuant to 1902(2)? Do you understand
9 the question? Can a state sua sponte, can a party
10 to NAFTA can sua sponte say, hey, this falls under
11 this, it has not been notified, but I want to still
12 want to challenge it pursuant to that mechanism?

13 MS. MENAKER: I believe, of course, that
14 yes, of course, a state party would of course have
15 that ability. Again, if the purpose of Article
16 1903 here is to provide a state party the
17 opportunity to challenge an amendment made to
18 another party's antidumping and countervailing duty
19 law, I mean, all 1902 is there to do is for a
20 matter of transparency, to provide notice to the
21 other parties when you are engaging in such actions
22 so they can determine for themselves whether they

1 think that action is consistent with the NAFTA
2 obligations. In my view, it would make no sense to
3 say that a party would lose its opportunity to
4 challenge the amendment because it chose not to
5 notify the other parties that it was making that
6 amendment.

7 PRESIDENT GAILLARD: That's your legal
8 determination?

9 MS. MENAKER: Yes.

10 PRESIDENT GAILLARD: It's not a
11 precondition?

12 MS. MENAKER: That's correct.

13 PRESIDENT GAILLARD: So, it's
14 considerable--tell me whether I'm wrong--that if
15 the U.S.--the authorities in the U.S. who are
16 trying to repeal the Byrd Amendment to comply with
17 the ability of decisions are not successful, it is
18 not out of the question that Canada could at this
19 stage use the 1903 mechanisms.

20 MS. MENAKER: Yes.

21 PRESIDENT GAILLARD: Thank you.

22 ARBITRATOR HARPER: I take it the last

1 question was intended to be answered no, it's not
2 out of the question?

3 MS. MENAKER: I apologize, that's correct.

4 PRESIDENT GAILLARD: The "yes" means yes,
5 it could?

6 MS. MENAKER: That is correct.

7 PRESIDENT GAILLARD: Thank you.

8 At this stage, turning to claimant's side
9 do you have any comment? These questions, as you
10 understand, are really directed to the U.S., I
11 mean, to the respondent, but do you want to make
12 any comment on any of these answers, the relevance
13 or whatever?

14 MR. LANDRY: Could we have one moment,
15 please?

16 PRESIDENT GAILLARD: Sure. Being
17 understood that we understand your legal arguments
18 as expressed so far.

19 (Pause.)

20 PRESIDENT GAILLARD: Mr. Howse?

21 PROFESSOR HOWSE: Thank you. We have a
22 few observations. First of all, there was one

1 aspect of Ms. Menaker's remarks that we didn't
2 quite understand. In her final reply to your
3 question, Mr. President, she said that it was
4 possible for Canada, the party Canada, to
5 bring--still bring a review action under 1903 in
6 respect of the Byrd Amendment. Slightly earlier in
7 her remarks she had a formulation that was I think
8 along the following lines that Canada could have
9 done that, but Canada chose instead to challenge
10 the determinations in the Chapter 19 binational
11 panel process.

12 And we--so, in light of her final answer,
13 we understand that what she was not saying by that
14 was that by going the route of the binational panel
15 process, Canada had somehow lost its right to
16 challenge the Byrd Amendment as such because when
17 she was saying those words, that was how we
18 actually heard them, that at one point in time
19 Canada could have gone the 1903 route and
20 challenged the Byrd Amendment, but instead
21 challenged the determinations. And we just want to
22 make sure--well, this is really for the Tribunal.

1 We would just like to the bring to the Tribunal's
2 attention the importance on this point of making
3 sure that she didn't mean by that somehow that
4 although otherwise Canada could still go through
5 1903, that somehow Canada had made a choice of a
6 different forum in which to air its concerns about
7 the Byrd Amendment that would somehow preclude it
8 for that reason now from going to 1903.

9 PRESIDENT GAILLARD: But it's hard for
10 respondent to speak for Canada. I mean, isn't it?
11 My questions were answered in that they were
12 pertaining to understanding the legal framework
13 rather than the actual determinations of each NAFTA
14 party or each individual party with respect to all
15 this. So, my questions were asked in a
16 hypothetical form, and I think that was answered in
17 the same form.

18 Now, what about Canada as a NAFTA Party
19 capital P, intends to do is a different issue. So,
20 that your point is well-taken, in other words.
21 Thank you.

22 PROFESSOR HOWSE: The second observation

1 is--and this is simply obvious, I will just
2 stop--which is concerning what 1903 says about the
3 kind of action that Canada could bring and its
4 consequences, and we would just underline that 1903
5 allows Canada to bring a declaratory--to ask for a
6 declaratory opinion, and 1903(1) limits the force
7 or effect of that declaratory opinion.

8 And when we look at what the force and
9 effect is limited to, at the end of the day there
10 is a possibility of corrective legislation, and if
11 that does not happen, the possibility that Canada
12 could be entitled as a kind of countermeasure to
13 enact its own equivalent of the Byrd Amendment in
14 this example.

15 And what is important about that, in our
16 submission, is that Canada cannot espouse through
17 1903 any kind of a claim for reparations on
18 Canfor's behalf. So, we just want to make that
19 submission in relation to the point about
20 duplication versus, you know, different remedies
21 and different regimes; that even if Canada went
22 through the 1903 process, the language shall have

1 force or effect only as provided in this Article
2 seems to really make very clear that Canada could
3 not use this action to in effect to espouse a claim
4 on behalf of an investor that had been injured.

5 PRESIDENT GAILLARD: Thank you, Professor
6 Howse. As I said, we have well in mind all of your
7 argument, and the questions were not intended to
8 prejudice any of those arguments.

9 Now, Mr. Harper still has a number of
10 questions, so I think we should hear them now. I
11 don't want to restrain you, but, you know, the time
12 frame depends on the length of the answers. So, if
13 you can be to the point, we don't need to restrain
14 any. You have to answer all the questions, but if
15 you can be to the point, it would help. Thank you.

16 ARBITRATOR HARPER: Thank you,
17 Mr. President.

18 Let me explore an issue that I think would
19 be helpful for the Tribunal to understand in
20 respect of whether Canfor's position necessarily
21 contains an inconsistency between Chapters 11 and
22 19. That's the headline for this line of inquiry.

1 Let me begin by observing that under
2 1902(1) the United States, of course, reserves the
3 right administratively to enforce its antidumping
4 and countervailing duty laws. It does not
5 grant--do you agree, members of the Canfor
6 team?--it does not grant anywhere in Chapter 19 the
7 authority for review of preliminary determinations.
8 Do you agree with that?

9 MR. LANDRY: Mr. Harper, it is correct
10 that you cannot review a preliminary determination
11 under Chapter 19.

12 ARBITRATOR HARPER: But I take it,
13 nonetheless, Mr. Landry, that under Canfor's
14 approach in this case Canfor takes the position
15 that under Chapter 11 there can be review of
16 administrative actions, including preliminary
17 determinations in respect of antidumping and
18 countervailing duty laws.

19 MR. LANDRY: One moment, please.

20 (Pause.)

21 PROFESSOR HOWSE: Mr. Harper, thanks for
22 this opportunity to provide further clarification.

1 It's our submission that Chapter 11 is not about
2 review, quote-unquote, of determinations. It
3 really creates the standard of treatment for all
4 conduct attributable to a state under the
5 appropriate rules of state responsibility unless
6 that conduct is somehow carved out in Chapter 11 or
7 elsewhere of the NAFTA. So, the real question
8 before the Tribunal, in our submission, is whether
9 1901(3) provides some kind of carve-out, and what
10 kind of carve-out it is.

11 The nature of state responsibility under
12 Chapter 11 really just follows in general the
13 general rules of state responsibility. So, if it's
14 attributable to a state, and it's caused harm and
15 it violates the standard, and there is nothing that
16 says otherwise, some exception or limitation
17 provision, yes, then a claim could be brought with
18 respect to those state acts.

19 ARBITRATOR HARPER: The state acts in
20 question being, Professor Howse, the preliminary
21 determinations that are flagged in the statement of
22 claim?

1 PROFESSOR HOWSE: Yes, it could include
2 that, or it could even include conduct before a
3 preliminary determination. The investor would have
4 to prove that it's attributable to a state under
5 the ILC Articles. It would have to--the investor
6 would have to show that the conduct fell below the
7 standard of treatment in Chapter 11, and it would
8 have to show the investor was harmed, even though
9 the conduct occurred before the determinations. If
10 the investor can show all those things, we don't
11 think that there is any bar under the state
12 responsibility that's applicable to Chapter 11 to
13 making the claim. We believe that everything is
14 satisfied.

15 And I say, if there is no other bar, which
16 brings us back to the issue of what 1901(3) means.

17 ARBITRATOR HARPER: I'm talking about
18 Chapter 11 right now, and I'm asking you
19 specifically where you find text in that provision
20 in that part of the NAFTA that authorizes an
21 inquiry, an arbitration with respect to preliminary
22 determinations taken in antidumping and

1 countervailing law context.

2 (Pause.)

3 PROFESSOR HOWSE: Are you referring,
4 Mr. Harper, to the general provision in Chapter 11
5 that states what measures of a party are subjected
6 to the investor-state dispute settlement?

7 ARBITRATOR HARPER: I'm asking you to
8 identify for me the text in which you anchor the
9 proposition that an Arbitration Tribunal formed
10 under Chapter 11 has authority to consider
11 preliminary determinations of a antidumping and
12 countervailing duty law in nature.

13 PROFESSOR HOWSE: Well, I could refer you,
14 first of all, to 1101. 1101 says this chapter
15 applies to measures adopted or maintained by a
16 party relating to investors of another party,
17 investments of investors of another party, and so
18 forth. And it's our submission that the word
19 measures, both by virtue of its definition in the
20 NAFTA itself, which I believe my colleagues have
21 already referred to in our discussions here, as
22 well as just the ordinary meaning of measures in

1 international law, taken with the rules of state
2 responsibility mean that a measure is any act
3 attributable, properly attributable to a state that
4 is not somehow carved out by *lex specialis* in the
5 Treaty or provision in the treaty that carves it
6 out.

7 ARBITRATOR HARPER: So, if one labels the
8 preliminary determinations measures and takes the
9 view that 1901(3) does not in *haec verba* deal with
10 measures, Canfor's position is that preliminary
11 determinations are reached under 1101; is that
12 correct?

13 PROFESSOR HOWSE: Our position is that
14 clearly 1901(3) speaks to subset of measures.
15 Clearly law is a measure within the meaning of
16 NAFTA, but measure includes also things that are
17 not laws, but conduct attributable to a state,
18 according to normal rules of state responsibility.

19 ARBITRATOR HARPER: Was that an answer,
20 yes or no?

21 PROFESSOR HOWSE: I don't think that I can
22 myself give an answer that would be more

1 transparent on this question. I sense, Mr. Harper,
2 that--is there an attribution issue here? I mean,
3 I would just need a bit more guidance as to the
4 issue under state responsibility that's giving us
5 trouble here.

6 ARBITRATOR HARPER: Perhaps the best way
7 to approach this issue is to say that, if I
8 understand Canfor's position correctly, Canfor
9 believes that any action not specifically
10 denominated in 1901(3), as excluded from review
11 elsewhere under the NAFTA, is appropriate for
12 review determination by an arbitration panel under
13 Chapter 11, if an investor can claim there is harm
14 by a state.

15 PROFESSOR HOWSE: I think that we have
16 stated it as best we can our understanding of state
17 responsibility in Chapter 11.

18 It goes without saying that in determining
19 whether there is a violation of the substantive
20 standards in Chapter 11, the nature of the
21 particular act attributable to the state will be
22 very important to consider.

1 And so, a preliminary determination might
2 raise issues under the standard in Chapter 11 and
3 related rules of customary international law that
4 would be different than if the measure is a final
5 determination or judgment of a final court. I
6 mean, those would be issues.

7 So, we don't mean to suggest that in
8 determining whether Chapter 11 has been violated on
9 the merits, the Tribunal would simply have to be
10 indifferent to the nature of a preliminary
11 determination as a preliminary determination and
12 not something else.

13 We are just making a statement about the
14 overall ambit of state responsibility, what's
15 attributable to a state, and therefore what's
16 actionable rather than a statement about how the
17 Tribunal might want to view on the merits a
18 preliminary determination in determining whether
19 it's a wrongful act under international law within
20 the meaning of Chapter 11 as opposed to some other
21 kind of provision with a different degree of, I
22 don't know, that works in a different way that

1 might be--look more less final or whatever.

2 MR. MITCHELL: Mr. Harper, if I could only
3 briefly add to Professor Howse's remarks, as your
4 questions have been going to the question of where
5 within Chapter 11 is this matter rooted, and, of
6 course, the position of Canfor is as that matter
7 has not been briefed, it is not before this
8 Tribunal.

9 And just in that regard, the Tribunal
10 directed the United States to a file a defense on
11 jurisdiction, and it raised the, as objection to
12 jurisdiction number one, the issue concerning
13 Article 1901(3) to which the parties' respective
14 submissions have been directed.

15 It raised a second what it referred to as
16 a conditional objection to jurisdiction; namely,
17 that the complaints of Canfor were not grounded
18 within a Chapter 11. And at paragraph nine of its
19 Statement of Defense, it stated specifically that
20 the United States does not propose that the
21 Tribunal take up this question as a preliminary
22 matter, and so the issue of to what extent and

1 where within Chapter 11 are the measures grounded
2 is, in our respectful view, not a question before
3 the Tribunal on this application.

4 ARBITRATOR HARPER: I thank you for that,
5 Mr. Mitchell. I think it's fair to say that it
6 misapprehends my line of inquiry. I have been
7 concerned to understand how 1903 is to be
8 understood in Canfor's litigation position, and I
9 had understood and I think I still understand
10 correctly, that Canfor takes the view that 1903 is
11 to be understood as a normative provision. That is
12 to say, normative acts can be captured by the
13 exclusion, but not, if you will, actual acts.

14 And I take it, if I understand Professor
15 Howse correctly, actual acts are captured in his
16 view by whatever the state may do that violates
17 rights of Canfor, and those actual acts can be
18 subsumed in 1101. Have I got it incorrectly?

19 PROFESSOR HOWSE: Well, all of the acts to
20 which you're referring would normally be acts
21 attributable to a state and measures within the
22 meaning of 1101.

1 The question that Canfor is addressing
2 here is what bearing 1901(3) might have on that.
3 And you're quite correct, Mr. Harper. In our
4 submission, the phrase "antidumping and
5 countervailing duty law" in 1901(3) refers to the
6 normative material or general rules, et cetera, et
7 cetera, of precedential weight, whether
8 administrative practice or otherwise to be applied
9 in future cases, and it does not apply to acts like
10 determinations in their color as decisions,
11 discrete decisions affecting the investor as
12 opposed to decisions that may affect the resolution
13 of matters through their precedential influence on
14 future decision making.

15 ARBITRATOR HARPER: And you reached that
16 view, of course, by adumbrating as well 1902(1) as
17 being confined to normative acts; am I correct?

18 PROFESSOR HOWSE: Not normative acts, but
19 material that may have normative weight in the
20 sense that material that may be used in the future
21 in general and applied in future cases to the
22 resolution of those cases.

1 ARBITRATOR HARPER: And having said that,
2 you are able, I take it, to have the view that
3 Chapter 11, and in particular 1101, is not captured
4 by the exclusion of 1901(3) when what's at issue
5 under 1101, as you have indicated, are acts that
6 are not normative in nature?

7 PROFESSOR HOWSE: Yes, that is our
8 submission on the extent to which 1901(3) at the
9 extreme limit could modify 1101 as I understand it.
10 But I say at the extreme limit because we have
11 raised other interpretive issues and questions that
12 to our minds put in doubt whether 1901(3) is of
13 such a character at least to limit as a
14 jurisdictional bar the operation of Chapter 11,
15 even though it may affect the interpretation of
16 provisions in 11.

17 ARBITRATOR HARPER: Now, having come to
18 that view, when the Tribunal is convened under
19 Chapter 11, do you understand that we have
20 authority to opine on normative acts as such?

21 PROFESSOR HOWSE: I think that it would
22 depend on the meaning of the word opine. My

1 view--I mean, Canfor's view of this case is that
2 the answer is that a tribunal has to answer the
3 questions and issues put before it by the parties,
4 and in doing so, it may have to en passant, as it
5 were, make a variety of kinds of determinations
6 about normative matters.

7 Of course, in doing so, the Tribunal
8 would, I would assume, be very sensitive to the
9 fact that it is only making--would be making those
10 determinations solely for purposes of discharging
11 its mandate and solely within the confines of the
12 kind of relief and remedy available in an
13 investor-state setting.

14 ARBITRATOR HARPER: So, Canfor is of the
15 view that in this proceeding the meaning of 1901(3)
16 for this Tribunal is that it has nothing to do with
17 the allegations set forth in the Statement of Claim
18 because those allegations relate to acts only and
19 not normative provisions?

20 (Pause.)

21 PROFESSOR HOWSE: I don't believe that we
22 have anything in addition to say beyond what we

1 have already submitted on that--on that question.

2 So, Mr. Harper, if there was something specific
3 that were troubling you about the answer, we would
4 be delighted if you could possibly just enlighten
5 us about that specific dimension so that we could
6 focus on that. But as a general matter, when we
7 take your general question, we don't seem to think
8 that we could say more to make the general position
9 more clear.

10 ARBITRATOR HARPER: Let me just put it one
11 more way and then we can move on to another
12 subject. Tell me whether I'm right, Professor
13 Howse. In Canfor's view, 1901(3) makes an
14 exclusion from the reach of any other provision of
15 NAFTA for any normative acts. That's not your
16 position?

17 PROFESSOR HOWSE: For any normative acts?

18 ARBITRATOR HARPER: Normative acts
19 relating to antidumping and countervailing duty
20 laws.

21 PROFESSOR HOWSE: No, we do not use the
22 terminology "normative acts." We use the

1 terminology materia as defined--we go back to the
2 text of the NAFTA, and we find the definition of
3 antidumping and countervailing duty law in 1902,
4 and we say that 1902 provides part of the context
5 for 1901. So that to understand the ambit of law
6 when it's referred to in 1901(3), we have to look
7 at the definition of in 1902 of antidumping and
8 countervailing duty law.

9 And it's our submission when we look at
10 all of the elements listed, and maybe it's not an
11 exclusive list, but what's common to all of these
12 elements is they are things that are normative
13 material that is used in the decision of future
14 cases, in the nature of general material that a
15 decision maker will apply in a future case. So,
16 legislative history would be an example of that.
17 Legislative history is not a normative act but it's
18 material that may be drawn on by tribunals and
19 courts in applying the law in general to future
20 situations.

21 Similarly, as was extensively discussed,
22 it's significant that the use of the term judicial

1 precedents is there, not judicial decisions. Why
2 is it precedents? Because here we are looking at
3 judicial acts from the perspective of their
4 normative character as decision rules in future
5 cases.

6 ARBITRATOR HARPER: So, when I look at
7 1901(3) and I see a declaration that says no
8 provision of any other chapter of this agreement
9 shall be construed as imposing obligations,
10 et cetera, am I to understand that Canfor's
11 position is that that direction shall not or shall
12 be construed--shall not be construed, in effect--is
13 a direction to the panel for future acts, we're not
14 to do something in the future; right? We are not
15 to make a normative judgment in the future about
16 antidumping and countervailing duty laws?

17 PROFESSOR HOWSE: I would go back to our
18 Statement of Claim and our reliance on chapter--the
19 rights and obligations in Chapter 11. The relief
20 that we are claiming and in seeking would not, in
21 our submission, require or even imply the necessity
22 for the United States to change the rules with the

1 partial exception, and we have been through the
2 Byrd Amendment, so let's put that because we spent
3 a lot of time about understanding the nature of our
4 claim and the Byrd Amendment, but generally
5 speaking we don't think that if this Tribunal
6 adjudicates this matter it would need in
7 providing--in order to get to the point where it
8 provides relief to Canfor to make any kind of--to
9 do anything that would result in essentially
10 placing an obligation on the United States to
11 change the normative material that's used because
12 our concern is the way that the material has been
13 used by officials in this particular matter--and
14 again, we are not challenging the whole system--we
15 are dealing with a pattern of conduct where the way
16 that officials have used or abused, in our
17 submission, this material, not the material itself
18 that ought to be applied and is applied normally by
19 U.S. officials in normal antidumping and
20 countervailing duty matters that don't have the
21 very abnormal complexion of this case as we pleaded
22 it.

1 ARBITRATOR HARPER: Tell me whether I'm
2 right in trying to understand the Canfor position.
3 Canfor has said, I believe, that even where an
4 antidumping and countervailing law determination
5 passes muster under a municipal regime, such law
6 could still be overturned in a Chapter 11
7 proceeding for violating international standards?

8 PROFESSOR HOWSE: First of all,
9 Mr. Harper, thank you for the occasion to be able
10 to again refer you to our submission, that we don't
11 believe that under a Chapter 11 provision any law
12 can be overturned. It's our submission that all
13 that can be done by a Chapter 11 panel is to find
14 that there is a violation of the standards of
15 Chapter 11 and to make an award of damages or
16 relief of that monetary relief as it sees fit. We
17 don't believe that a Chapter 11 process can be used
18 to overturn laws.

19 ARBITRATOR HARPER: And similarly, Canfor
20 does not believe that a Chapter 11 process can be
21 use to do so overturn antidumping and
22 countervailing duty law determinations?

1 PROFESSOR HOWSE: No. And the simple fact
2 of the matter is that the investor cannot go to
3 Chapter 11 to get the determinations overturned,
4 and that goes to our point about on duplication
5 that there are different remedies here, that this
6 remedy is different. It's monetary relief for the
7 harm suffered, not for prospective relief in
8 removing or ceasing the improper conduct in the
9 future.

10 ARBITRATOR HARPER: So, Canfor is not
11 looking to overturn any preliminary determinations
12 whatever; is that correct?

13 PROFESSOR HOWSE: We stated the nature of
14 the relief that we are seeking in the Statement of
15 Claim, and we would assure the Tribunal that we are
16 not going to a Chapter 11 panel to try to get what
17 a Chapter 11 panel cannot be properly expected to
18 give, which is specific prospective relief of that
19 nature.

20 ARBITRATOR HARPER: When Canfor looks for
21 damages in this proceeding, is it looking for those
22 damages on the grounds that international norms are

1 violated in connection with the preliminary
2 determinations?

3 PROFESSOR HOWSE: Our submission is that
4 international norms, as stated in the relevant
5 provisions of Chapter 11 have been violated by all
6 the acts complained of in the Statement of Claim as
7 well as the interaction and collective and overall
8 nature of the U.S.'s behavior in this matter.

9 ARBITRATOR HARPER: So, the answer is yes?

10 PROFESSOR HOWSE: I'm not sure why the
11 answer I just gave would not be comprehensible.
12 Maybe can you refine that for me a bit, Mr. Harper.

13 ARBITRATOR HARPER: I was asking for what
14 I will consider a part, if you will, of Canfor's
15 position.

16 Is it Canfor's position that it is
17 requiring in this proceeding that--or seeking to
18 require in this proceeding that the United States
19 pay damages in respect of preliminary
20 determinations?

21 PROFESSOR HOWSE: I'm sorry that I'm not
22 quite sure that I understand because preliminary

1 determinations form one kind of act--yeah, I guess
2 yes, because in a way what we are saying is
3 preliminary determinations are attributable and
4 engage state responsibility under Chapter 11.

5 So, they could result in an award of
6 damages either taken in themselves as violations of
7 the standards in chapter 11 or collectively as part
8 of the bigger picture of the conduct, the overall
9 conduct of the United States in this matter. (Side
10 two begins here.)

11 ARBITRATOR HARPER: Let me put it to you
12 differently. What Canfor is looking here is for
13 this panel to construe Chapter 11 with its
14 international law norms as imposing an obligation
15 upon the United States to pay damages for the
16 administration of its antidumping and
17 countervailing duty laws?

18 MR. LANDRY: No.

19 ARBITRATOR HARPER: No? Is that the
20 answer?

21 MR. LANDRY: Yes.

22 One moment, sir.

1 (Pause.)

2 PROFESSOR HOWSE: In our submission, the
3 obligation to pay damages arises from the conduct
4 complained of in the Statement of Claim, and, of
5 course, general state responsibility.

6 ARBITRATOR HARPER: And that arose sua
7 sponte in the ether, or did it arise, in Canfor's
8 view, because it would obtain an order of this
9 Tribunal directing the United States to pay
10 damages? I don't understand the answer you just
11 made.

12 PROFESSOR HOWSE: Well, as I think was
13 raised in the discussion between Ms. Menaker and
14 Professor Weiler yesterday or the day before, I
15 think that she at one point noted that even
16 assuming the U.S. interpretation of 1901(3), it
17 wouldn't relieve the United States of the
18 obligation under customary international law to pay
19 reparations for acts that Canfor is complaining of
20 that might violate customary international law.

21 I mean, the obligation to pay reparations
22 or compensation for harm of that nature comes from

1 the international law of state responsibility.

2 ARBITRATOR HARPER: Are you saying that if
3 this Tribunal orders the United States to pay
4 damages to Canfor, that order would not be the
5 imposition of an obligation upon the United States
6 to pay damages?

7 PROFESSOR HOWSE: Well, it's an obligation
8 to pay damages, but where you're going is then,
9 isn't it an obligation to pay--isn't that an
10 obligation in respect of countervailing and
11 antidumping duty law?

12 ARBITRATOR HARPER: I'm heading there.

13 PROFESSOR HOWSE: Yeah. We think that the
14 words in respect of antidumping and countervailing
15 duty law in context do not cover that kind of--that
16 kind of obligation. The obligation stems from
17 wrongful conduct and state responsibility for
18 wrongful conduct in international law as embodied
19 in Chapter 11, and it doesn't stem from, or it
20 isn't in respect to the countervailing and
21 antidumping duty law. It's an obligation to pay
22 money.

1 ARBITRATOR HARPER: Should we then strip
2 out of the Statement of Claim any reference to the
3 preliminary determinations?

4 PROFESSOR HOWSE: No, because the
5 preliminary determinations are one in a series of
6 wrongful acts, individually and collectively, that
7 through the lenses of Chapter 11 must be viewed, in
8 our submission, as violating the international law
9 standards in that chapter.

10 So, we don't need to strip anything out.
11 It's just that any obligation to pay damages that
12 arises from this proceeding is, in our submission,
13 not an obligation in relation to antidumping and
14 countervailing duty law. It's an obligation that
15 arises out of state responsibility under Chapter 11
16 and does not imply any duty on the United States to
17 change or alter in any way the normative material
18 on the basis of which it decides future cases, and
19 therefore it's not an obligation within the meaning
20 and context of 1901(3).

21 ARBITRATOR HARPER: The preliminary
22 determinations flow from the enforcement of U.S.

1 antidumping and countervailing duty law; is that
2 correct?

3 PROFESSOR HOWSE: Yes, but the
4 wrongfulness of them flows from Chapter 11 and the
5 state responsibility to provide reparations for the
6 wrongfulness flows from Chapter 11.

7 PRESIDENT GAILLARD: I hate to interrupt
8 this fascinating discussion, but we will have to
9 have a recess, a five minutes recess shortly, if
10 that's a good time.

11 We want to answer hear the answer because
12 I'm concerned--we need a pause at some point, and I
13 think now is it a good time. Maybe after the
14 answer?

15 We understand your argument as far as it
16 says that actions to criticize are taken
17 individually or collectively. I'm not saying it's
18 right or wrong, but we understand this aspect of
19 the contention.

20 MR. LANDRY: Mr. President, I wonder if we
21 could take a brief lunch break because we do have
22 some commitment that has to be dealt with.

1 PRESIDENT GAILLARD: I'm not sure we want
2 to do that. I think we are almost done, and I
3 really think in fairness to all participants, I'm
4 sorry for those personal commitments, but we have
5 taken these days a long time ago. We reserved
6 three days. If members, individual members of the
7 team have their own obligations, it's understood.
8 They are excused, but the team itself should be
9 here, and we want to go on. So, we will go on
10 until one with the aim of finishing at one. If we
11 are not finished, we will resume at two. So, make
12 your arrangement according to that schedule,
13 please, and now we have five minutes recess. We
14 will resume, according to this watch, at noon.
15 Thank you.

16 (Brief recess.)

17 PRESIDENT GAILLARD: We resume the
18 hearing, and Mr. Harper still has a few questions
19 for claimant to start with.

20 ARBITRATOR HARPER: With respect, and
21 thank you, Mr. President, to one of the issues in
22 this matter, namely the relation between 1901(3)

1 and 1902(1) and the supremacy clause, as I shall
2 dub it, of 1112, I would invite Canfor to reflect
3 on the following proposition: That if this
4 Tribunal is to be asked, as it is in the Statement
5 of Claim to fasten upon the United States an
6 obligation to pay damages, doesn't the Tribunal
7 need explicit authorization in the NAFTA for that
8 in light of the safe harbor of 1901(3) and 1902(1)
9 and the supremacy clause? And by that, what I mean
10 specifically is, under the supremacy clause, of
11 course, if there is a conflict between various
12 provisions, it is Chapter 19 that prevails.

13 So, if we have any doubt about any
14 potential conflict between what Canfor is looking
15 for and what we have authority to do under Chapter
16 11, don't we need to find some explicit text for it
17 rather than making only an inference for it?

18 MR. MITCHELL: If we could just have a
19 moment, Mr. Harper.

20 (Pause.)

21 MR. MITCHELL: Let me try and answer you
22 this way, Mr. Harper: My first point is that we

1 agree with the United States insofar as when you
2 asked Mr. McNeill whether there was an
3 inconsistency between Chapter 11 and in particular
4 with reference to Article 1112 and Chapter 19, he
5 answered you, in answer to the question whether it
6 is the position of the United States that there is
7 any inconsistency between Chapter 11 and Chapter
8 19, his answer was no. And so, I think correctly
9 so in saying that there is no inconsistency as that
10 term would be generally understood, meaning that
11 the two provisions could not stand together. So,
12 that's my first answer to your question.

13 My second answer is that the authority of
14 the Tribunal to award damages to Canfor in respect
15 of the violations we urge the Tribunal or will urge
16 the Tribunal to find is found in the provisions of
17 Section B of Chapter 11, and that if the claimant
18 is able to establish that there have been
19 violations of those provisions measured against the
20 international standards that we have urged in our
21 earlier submissions, and which I'm not going to
22 revisit, Article 1135 gives the Tribunal the

1 authority to make an award of monetary damages and
2 interest. And it's our submission that nothing
3 more explicit is required.

4 ARBITRATOR HARPER: Thank you,
5 Mr. Mitchell. Let me just probe that a bit.

6 If there is plausibility in the
7 proposition that international norms conflict with
8 municipal norms and we are asked to apply
9 international norms, is it Canfor's position that,
10 in so doing, we would be acting inconsistent with
11 municipal norms?

12 (Pause.)

13 MR. MITCHELL: The reason I'm hesitating
14 is the slippage or the movement in language from
15 the notion of inconsistency as that term is used in
16 1112, Article 1112, and your question which related
17 to whether you would be acting inconsistently as a
18 tribunal with municipal norms. And it's our
19 submission that you would be applying in the NAFTA
20 Chapter 11 arbitration the norms, the standards,
21 the legal rules set out in NAFTA Chapter 11 to
22 determine whether the conduct of which we complain

1 violates those standards, and the issue of whether
2 you would be acting inconsistently as a tribunal
3 with municipal norms I submit doesn't arise.

4 ARBITRATOR HARPER: You assert it doesn't
5 arise, but is that enough? I mean, let's suppose,
6 as we have in these proceedings, that a Chapter 19
7 binational panel finds that challenged antidumping
8 and countervailing duty measures are consistent
9 with domestic law. Nonetheless, they are
10 challenged in a Chapter 11 proceeding before an
11 arbitral tribunal as being inconsistent with
12 international norms. Is it not the case under that
13 hypothesis that the application of international
14 norms by a tribunal like this one to the domestic
15 regime would be inconsistent--that is to say it
16 would be a different result, they would be deemed
17 wrong where they had been deemed right before--with
18 the domestic norms?

19 (Pause.)

20 MR. MITCHELL: I think you're correct when
21 you say that there would be a different result,
22 given what we have already talked about in terms of

1 the authority of a Chapter 19 panel to remand to
2 the DOC or the ITC for action in the municipal
3 regime, and the authority or the outcome or result
4 in a Chapter 11 proceeding, namely the payment of
5 damages by virtue of the violation of the
6 international wrong. To that extent, there is a
7 different result in the two proceedings, as we have
8 made clear throughout our written and oral
9 submissions in these proceedings.

10 In our view, that is not an inconsistency,
11 and certainly not an inconsistency as contemplated
12 by Chapter 11, Article 1112. It I think is not
13 contended there can be different results in the
14 municipal regime and in the international regime.

15 ARBITRATOR HARPER: Isn't the difficulty,
16 though, Mr. Mitchell, that your position as
17 Canfor's representative here requires you to assert
18 that Chapter 11 incorporates international norms?
19 And if it does, then it necessarily makes those
20 norms under this hypothesis inconsistent with the
21 municipal norms under Chapter 19?

22 (Pause.)

1 MR. MITCHELL: With respect to the first
2 part of your question, is it Canfor's position that
3 Chapter 11 incorporates international norms, I
4 don't think that proposition is contended. With
5 respect to the latter part of your question, does
6 the existence of international norms in Chapter 11
7 necessarily make those norms inconsistent under
8 this hypothesis with the municipal norms under
9 Chapter 19, our answer is no for the reasons we've
10 articulated in our written and oral submissions
11 and--as we previously articulated.

12 ARBITRATOR HARPER: Mr. Mitchell, you have
13 just told me, and I'm reading now from page 11 or
14 at 113 and 114 of today's transcript that Canfor's
15 position is that Chapter 11 does not incorporate
16 international norms. Is that what you're telling
17 me?

18 MR. MITCHELL: I'm sorry, Mr. Harper, I
19 have different page references.

20 ARBITRATOR HARPER: Well, I'll just ask
21 you what your position is again. Are you
22 saying--just categorically tell me--are you saying

1 Chapter 11 does not incorporate international
2 norms?

3 MR. MITCHELL: Let me just repeat my
4 answer. The question was: Is it Canfor's position
5 that Chapter 11 incorporates international norms?
6 And my answer is that I don't think that that
7 proposition is contested.

8 ARBITRATOR HARPER: "Is contested,"
9 meaning by that what? It does or it does not?

10 MR. MITCHELL: Chapter 11, Article 1102,
11 Article 1105, Article 1110 obviously incorporate
12 the international standards, like the discussions
13 we have been having, and Mr. Landry's submissions
14 were directed entirely in substance to that
15 question.

16 ARBITRATOR HARPER: So, Chapter 11
17 incorporates international norms. You're asking
18 this Tribunal to find that various actions of the
19 United States Government pertaining to antidumping
20 and countervailing duty matters are inconsistent
21 with those international norms; is that correct?

22 MR. MITCHELL: We're asking this Tribunal

1 to look at all of the evidence we will present and
2 determine that the conduct of the United States in
3 connection with the matters of which we complain
4 violates the international norms set out in Chapter
5 11.

6 ARBITRATOR HARPER: But let's be precise,
7 Mr. Mitchell. The conduct I'm talking about is
8 antidumping and countervailing duty law
9 determinations. That's part of the conduct of
10 which Canfor complains; is that correct?

11 MR. MITCHELL: And again, I believe our
12 submissions orally and in writing have been clear
13 on this. The conduct of which Canfor complains
14 includes, in part, the conduct leading up to and
15 resulting in the determinations, yes.

16 ARBITRATOR HARPER: Determinations of...

17 MR. MITCHELL: The determinations of, for
18 instance, the DOC and ITC.

19 ARBITRATOR HARPER: All right.
20 Antidumping and countervailing duty law; is that
21 correct?

22 MR. MITCHELL: Well, no, Mr. Harper, and

1 I'm going to again--and the transcript and the
2 written submissions should reflect what Canfor's
3 position is with respect to the antidumping--the
4 meaning of antidumping and countervailing duty law
5 and whether a determination is antidumping and
6 countervailing duty law.

7 ARBITRATOR HARPER: I did not understand
8 what you just said. Would you say what you mean so
9 I can understand it, please. Answer, if you would,
10 this question: Is part of Canfor's claim premised
11 upon an attack upon determinations of
12 administrative agencies of the U.S. Government in
13 respect of antidumping and countervailing duty
14 laws? I think that emits of a yes or a no.

15 (Pause.)

16 MR. MITCHELL: Mr. Harper, we have, to the
17 best of our ability, articulated Canfor's position
18 with respect to the basis for its claim, and you
19 ask a question that, in our submission, that
20 assumes the result, and as we have had a
21 considerable debate about the meaning of the words
22 antidumping and countervailing duty laws, and we

1 stand on the submissions that we have made orally
2 and in writing over these three days with respect
3 to the nature of our claim.

4 ARBITRATOR HARPER: Are the preliminary
5 determinations cited in your Statements of Claim
6 preliminary determinations in the area of
7 countervailing duty law and antidumping law?
8 Again, I think that's a yes-or-no question. Either
9 they are or not.

10 MR. MITCHELL: Mr. Harper, I don't think
11 we can add anything further in our response than
12 that which we've already said in our written and
13 oral submissions with respect to the claim being
14 advanced by Canfor.

15 ARBITRATOR HARPER: I consider that
16 nonresponsive.

17 (Pause.)

18 MR. MITCHELL: The position of Canfor is
19 that the preliminary determinations arise as a
20 result of the conduct of United States officials
21 which we say was exercised improperly in the
22 antidumping and countervailing duty field. Your

1 question asked whether the determinations are in
2 the area of antidumping or countervailing duty law,
3 and we have made extensive submissions on our view
4 of that phrase, and that determinations are not
5 law.

6 ARBITRATOR HARPER: Let me come back to
7 the issue of international law. Chapter 11
8 incorporates international law standards. That's
9 Canfor's position; correct?

10 MR. MITCHELL: Yes.

11 ARBITRATOR HARPER: And is it also
12 Canfor's position that those international law
13 standards may differ from municipal law standards?

14 MR. MITCHELL: Again, the question is at
15 an extremely high level of generality, but clearly
16 international law standards can differ from
17 municipal law standards as is the very nature of
18 the two different regimes.

19 ARBITRATOR HARPER: And what is Canfor's
20 position in respect of a situation where the
21 Tribunal could reach a determination that actions
22 by the U.S. Government violated international

1 standards, even though binational panels formed
2 under Chapter 19 had decided that those same
3 actions did not violate U.S. domestic law? Do you
4 agree that in that circumstance the results of
5 proceedings in this Tribunal would be inconsistent
6 with a result before a binational panel under
7 Chapter 19?

8 MR. MITCHELL: No.

9 ARBITRATOR HARPER: You agree that such a
10 circumstance would be consistent; that is, the two
11 results would be consistent?

12 MR. MITCHELL: The two results would be
13 different. The municipal results from the
14 binational panel would be within the scope of the
15 remedies. A binational panel is able to offer, as
16 we've discussed, remand or affirming a
17 determination, and the international result would
18 be in the Chapter 11 context a determination that
19 the United States had not lived up to either the
20 minimum standard of treatment or its obligations
21 under Article 1102 with the consequential award of
22 damages.

1 ARBITRATOR HARPER: Do you admit that
2 there could be a plausible ground for differing
3 with Canfor on that position? That is to say that
4 one might plausibly take the view that the two
5 results are inconsistent?

6 MR. MITCHELL: That is a question that the
7 Tribunal may consider relevant for it to determine.

8 If I can just take a step back, though,
9 the discussion we have moved from--towards is a
10 discussion about inconsistency of result. And
11 again, I note the United States's position that
12 they do not contend there is an inconsistency, but
13 if I can just revisit the language of Article 1112,
14 it refers to in 1112(1), in the event of any
15 inconsistency between this chapter and another
16 chapter, the other chapter shall prevail to the
17 extent of the inconsistency; i.e., relating to the
18 Treaty obligations but not to the result of the
19 administration of a municipal law regime and the
20 parallel results of the administration of an
21 international law regime. That is not to what
22 Article 1112 is directed.

1 ARBITRATOR HARPER: And, Mr. Mitchell, if
2 the panel, if this Tribunal came to the view that
3 while there is force in the position you have just
4 articulated, the matter is not free from
5 doubt--that is to say, that 1112(1), by reading in
6 futuro, namely in the event of any inconsistency,
7 that the drafters of the Treaty had in mind the
8 notion of inconsistent results quite apart from
9 inconsistent texts--

10 MR. MITCHELL: If I could just have a
11 moment, Mr. Harper, to respond to that.

12 ARBITRATOR HARPER: I haven't finished the
13 question.

14 MR. MITCHELL: I'm sorry. I'm jumping the
15 gun there.

16 ARBITRATOR HARPER: If, as I say, the
17 panel, the Tribunal, were of the view that the
18 matter was not free from doubt, in your view--that
19 is, if you were Canfor--would that be a ground for
20 taking the position that one should avoid a
21 potentially inconsistent consequence by adopting
22 Canfor's position and instead read Article 112 as

1 essentially as a direction to the Tribunal that it
2 should not undertake to construe Chapter 11 with
3 its international obligations in a way that would
4 be inconsistent with the result that would obtain
5 under Chapter 19?

6 MR. MITCHELL: Just one moment,
7 Mr. Harper.

8 (Pause.)

9 MR. MITCHELL: Mr. Harper, the reason for
10 the pause was I was just checking to see in the
11 authorities that have been put before the panel
12 whether we had any cases where the issue of the
13 meaning of Article 1112 was addressed and in the
14 moment that I had I couldn't locate it, but I can
15 tell the Tribunal that the issue of the meaning of
16 1112 has been extensively briefed in other Chapter
17 11 cases, and my recollection of those is that the
18 notion was clearly not of inconsistency of result,
19 but was of whether the true Treaty provisions could
20 stand together.

21 And so, I believe my answer to your
22 question would be, no, that would not be a ground

1 for taking the position that you described.

2 PRESIDENT GAILLARD: Mr. Harper, are you
3 done with the questions?

4 ARBITRATOR HARPER: I am.

5 PRESIDENT GAILLARD: Thank you,
6 Mr. Mitchell for the answers.

7 On the respondent's side, do you want to
8 make certain comments or remarks on this line of
9 questioning? Being understood that it was directed
10 mainly to claimant.

11 MS. MENAKER: Not unless the Tribunal has
12 questions or clarifications that it wishes to seek
13 from us.

14 PRESIDENT GAILLARD: We have no questions
15 for you at this stage.

16 Now, that exhausts the questions of the
17 Tribunal. We said at one juncture you would have
18 an opportunity to answer questions which we may
19 have posed, and where no answer was provided
20 because of a break or something, that's a catch-all
21 question. Is there anything which, given the
22 questions we have asked, and your answers you wish

1 to answer at this stage? As far as we are
2 concerned, we think that you were very helpful in
3 answering all of our questions, but my memory may
4 be bad in this respect. So, my feeling says that
5 we have an answer to everything we wanted to hear
6 about. You may want to think about it.

7 On claimant's side first? Mr. Howse?

8 PROFESSOR HOWSE: Sorry, Mr. President.

9 That's our impression, too, Mr. President,
10 so unless there--but if it happens if there are
11 questions that are live in the minds or memories of
12 any member of the Tribunal that they feel we would
13 have needed to answer but for some reason because
14 of a break we didn't, we would be happy to hear
15 them, but we don't have any in mind.

16 PRESIDENT GAILLARD: On this side of the
17 Tribunal, we have no questions left. And thank you
18 for the answers.

19 Now, on the respondent's side, is there
20 anything you wish to add or clarify or you think we
21 have forgotten to ask you to answer in certain
22 respects?

1 MS. MENAKER: We don't have the need to
2 clarify or supplement any answers at this point, or
3 I should have ended any answers, period. I don't
4 believe there are any pending requests from the
5 Tribunal. The only thing I should add is that I
6 believe the Tribunal left open the question of
7 whether there would be a nonparty submissions made
8 pursuant.

9 PRESIDENT GAILLARD: I'm coming to that in
10 a second because that's sort of the procedural
11 aspects. I wanted to conclude the substantive
12 aspect of this three-day hearing.

13 So, I understand that if there are no--no
14 answers or nothing you want to raise at this stage
15 on the merits front, we can leave it there.

16 As to procedural issues, I still have a
17 number of points which I would like to address now.
18 I think we have ran exhibit number missing or
19 possibly a document which is not in the file.
20 Ms. Menaker, you alluded to a document which
21 was--which had to do with the Byrd Amendment. Have
22 you found the proper quotation, or can you tell us

1 where it is?

2 MS. MENAKER: Yes, we certainly did not
3 submit the Byrd Amendment, and we looked through
4 the record, and it appears that claimant did not
5 submit it with its materials. So, I don't believe
6 there is a copy of the Byrd Amendment with the
7 materials. I have my own copy that I pulled
8 off-line, but I don't believe the Tribunal has one.

9 PRESIDENT GAILLARD: So, my impression on
10 this was correct, we don't have it in the file?

11 MS. MENAKER: Yes.

12 PRESIDENT GAILLARD: Would the parties
13 jointly--I don't think it's a point of contention,
14 a point which is controversial in the least, but we
15 would like to have for our convenience the
16 document, so maybe you can exchange views among
17 counsel and file it with the Tribunal on behalf of
18 both parties, say, within a week. Would a week be
19 enough? It should be a very easy thing to do.

20 MS. MENAKER: Yes.

21 PRESIDENT GAILLARD: All right. So, that
22 would be agreeable on claimant's side?

1 MR. LANDRY: Yes.

2 PRESIDENT GAILLARD: On respondent's side?

3 MS. MENAKER: Yes.

4 PRESIDENT GAILLARD: Thank you.

5 As to the position of the U.S. with
6 respect to the Byrd Amendment and the question
7 which we asked with respect to Chapter 19, we thank
8 you for the answers provided orally, and given the
9 existence of a written record, we don't feel the
10 need to ask you to elaborate further on this. I
11 mean, the answers were clear and not unambiguous.
12 They are in the record, so I don't think we want
13 anything further from you on this point.

14 The third procedural issue is that you
15 will receive a transcript?

16 (Discussion off the record.)

17 PRESIDENT GAILLARD: In a few days, and I
18 invite--in a few days you will receive the
19 transcript as is, and I invite both parties to
20 consult with one another and submit jointly
21 directly to the Court Reporter any corrections
22 which are agreed upon. If there are matters which

1 are contentious and which are not agreed upon,
2 which I cannot imagine in that context as to the
3 transcript, with the tapes and all that, but we, of
4 course, would rule on that if need be, but I really
5 hope that can be done by consent, and it would be
6 useful for us to have a clean transcript after you
7 have helped with the corrections.

8 Any comment on that on claimant's side?

9 MR. LANDRY: We will work with the U.S.
10 counsel to deal with that issue.

11 PRESIDENT GAILLARD: On respondent's side,
12 it is agreed?

13 MS. MENAKER: Yes.

14 PRESIDENT GAILLARD: Thank you.

15 Now, with respect to the issue of
16 posthearing briefs, there are a number of
17 arbitrations in which after the hearing the parties
18 are invited to file posthearing briefs. This is
19 particularly necessary when we hear witnesses at
20 the hearing. When it's a hearing regarding legal
21 argument such as this one, it is not customary. I
22 would like to see--I would like to hear the

1 parties' determinations on this, being understood
2 that if there is a request or if you agree, we will
3 follow what you want. If you disagree, we will
4 rule on it. Being specified that on our side, we
5 do not feel that this is necessary. We thank you
6 very much for the explanations during this three
7 days, and for your written submissions before. We
8 think that we are fully briefed at this stage on
9 the relevant issues which are part of this part of
10 the case, and we do not wish to receive posthearing
11 briefs on the issues which are before us at this
12 juncture.

13 Now, what is your determination as far as
14 you're concerned? Mr. Landry?

15 MR. LANDRY: Subject to the issue, I'm
16 sure that you are going to be coming to in terms of
17 1128, but subject to that issue we don't see any
18 need ourselves for posthearing briefs.

19 PRESIDENT GAILLARD: Thank you.

20 On respondent's side?

21 MS. MENAKER: We agree.

22 PRESIDENT GAILLARD: Thank you.

1 There is an issue as to the costs. Both
2 parties request the costs of these proceedings.
3 Therefore we will need to receive evidence of what
4 it is or at least a statement, and some supporting
5 documentation of what it is on both sides because
6 both sides say I am right and I need. You must say
7 I'm right and give me the costs. So, we don't know
8 if we will rule on this or not, depending on where
9 we go, and obviously I have no idea at this stage,
10 but certainly we need to have the costs in the
11 files so that we can make, if we so decide, a
12 determination on this.

13 So, I guess it's not contentious because
14 both parties request a cost.

15 How do you envisage that, and do you want
16 to be given a time frame to submit your cost
17 statements?

18 MR. MITCHELL: Mr. President, what I'm
19 familiar with from other Chapter 11 arbitrations is
20 that the Tribunal has rendered its determination on
21 whether it's the final award or the preliminary
22 matter, and has then established a schedule for

1 briefing the issue of costs and the amount of
2 costs, and in my submission that would be the
3 appropriate process.

4 PRESIDENT GAILLARD: I was more thinking
5 of having a time frame established at which each
6 party would make its statement of costs with a
7 short time frame to discuss it by the other side.
8 So, for instance, but don't--the dates are not
9 relevant. Within two weeks both parties could give
10 us their costs, and then 10 days later we could
11 comment on the cost of the other side as to the
12 amount, it's outrageous, how can it be so
13 expensive, or whatever, so that which is also
14 fairly typical. So, we would rather not, in case
15 we address this issue, have to come back to you. I
16 would rather have everything in the file, and then
17 it may or may not become relevant because, as you
18 know, if we say we have jurisdiction, we may decide
19 on the costs now. If we have jurisdiction, we may
20 put it off to the merits. There are a number of
21 option which is are open to us, but at least we
22 would be more comfortable in having something.

1 So what I have in mind is the time frame
2 to submit your costs and then a time frame to make
3 comments on this particular issue.

4 If we do that, how long would you need for
5 the first phase, which would be simultaneous? You
6 would both submit your costs and you would both
7 comment on it? Given Christmas, maybe you want a
8 little more than what you would typically have.

9 MS. MENAKER: Mr. President, we have no
10 objection to proceeding in that fashion, and in
11 fact, we have proceeded in that fashion in other
12 Chapter 11 arbitrations. We would suggest or we
13 think we would need approximately four weeks to put
14 in our cost submission, and then if we did that
15 simultaneously, perhaps two weeks to comment on one
16 another's costs submissions.

17 PRESIDENT GAILLARD: Would that be enough
18 if we go down this road, on claimant's side? Three
19 weeks?

20 MR. LANDRY: I would suggest, in like of
21 the holiday say January 15th or whatever convenient
22 date is around there, which is about four and a

1 half weeks.

2 MR. MITCHELL: January 15. Four on weeks
3 from now.

4 PRESIDENT GAILLARD: I'm sorry, Mr.
5 Mitchell, including the answer or just the
6 submission?

7 MR. MITCHELL: To put in the submission.

8 PRESIDENT GAILLARD: Right. And then how
9 long would you need to comment? Like two or three
10 weeks would be in order, but no more than that.

11 MR. MITCHELL: It would be, but if I could
12 ask a point of clarification.

13 PRESIDENT GAILLARD: Please.

14 MR. MITCHELL: The issue often arises
15 where one party claims that they should be entitled
16 to costs and it has a different view with respect
17 to the other party. Do you envisage that these
18 submissions that we would be providing simply
19 reflect the amount of costs or reflect legal
20 argument relating to the principles under the
21 UNCITRAL Rules, et cetera?

22 PRESIDENT GAILLARD: Certainly the amount

1 of costs, and in this respect we would like a
2 breakdown. I'm not saying it's going to be
3 relevant. To be clear, we would like a breakdown
4 by phases, because we had several hearings in
5 several phases, the place of arbitration is one,
6 you know, the document production request is
7 another, so I would like you to make our life easy
8 in breaking down--you know what we have done so far
9 by our rulings and not getting into the answer to
10 any letter we have issued in this arbitration, but
11 the phases like the place of the arbitration, the
12 document production which can be a costly exercise,
13 whatever. Certainly this phase, the jurisdictional
14 arguments.

15 Now, we do not want as to the elaboration
16 on this, we do not want an argument which goes, I
17 need the costs because I'm really right and then
18 rehashing all the arguments on either side, because
19 that's the back door for the posthearing brief
20 which will be viewed as not accepted by the
21 Tribunal. On the other hand, as to the
22 appropriateness of awarding costs, the legal issue

1 of the appropriateness of awarding costs in case we
2 do A, B, C, or D, which is whatever we can do. We
3 can say no, we have no jurisdiction and then what
4 do we do. We can say, yes, we have jurisdiction
5 partially, we could say whatever.

6 But you don't discuss the merits of that.
7 You just take the opportunity and say, well, for
8 instance, on your side you may say well, even if we
9 lose on jurisdiction, the costs should not be
10 awarded. On the other hand, if we win on
11 jurisdiction, the costs should be awarded and give
12 references to the relevant arbitral case law or
13 sources which you may want to use, but I don't want
14 to see any arguments on the merits attached to it.

15 What about respondent's side?

16 MS. MENAKER: We agree with that approach.
17 If it would make it easier, we could agree to limit
18 any so-called argument, although taking into
19 account, of course, when I say argument, I don't
20 mean argument on the merits of the case, but
21 argument as to the appropriateness of awarding the
22 specific type of costs to one page in length or

1 something of that nature.

2 PRESIDENT GAILLARD: Two or three pages.

3 I hate the limitation. When we say one page, you
4 will use small print and it will be not legible. I
5 mean, be reasonable in this respect because it's a
6 boilerplate thing, we think what we have seen in a
7 number of arbitrations, and, you know. So, say
8 what you have to say in a few pages, but no
9 arguments on the merits.

10 Would that be okay?

11 As to the time frame, we are in your
12 hands, like January 15 is what? Whatever you want.

13 MR. MITCHELL: I think the United States
14 was suggesting, say, about three weeks after? Is
15 that what I understood?

16 PRESIDENT GAILLARD: Ms. Menaker said four
17 weeks from now. I don't know. If that's okay,
18 that's fine.

19 Friday, the 14th?

20 MR. MITCHELL: The 15th. And I think the
21 answer is no, we are not sure, but we believe it
22 is. And then two weeks to respond simultaneously

1 after that.

2 PRESIDENT GAILLARD: Friday is the 14th;
3 right?

4 MR. MITCHELL: Yes.

5 PRESIDENT GAILLARD: Let's say Friday the
6 14th of January for the submission.

7 And as to the degree of detail, don't send
8 us any taxi bill. You exercise your judgment as to
9 the details, I mean, which you want to give us as
10 to the supporting documentation. I mean, we trust
11 you as professional law firms and professional
12 agencies. What you will say will be prima facie
13 taken as right, unless it's very strange, in that
14 case we will get back to you. So, you don't need
15 to get into excruciating details in proving the
16 amounts, all right?

17 So, we say the 14th, and then two weeks
18 later, the 28th. And then comments, as understood
19 before by the 28th of January.

20 So, that takes care of the cost
21 submissions.

22 Now, I would like to hear your views now

1 as to my suggestion regarding the availability of
2 the consolidation of related proceedings pursuant
3 to Article 1126 having due consideration to,
4 quote-unquote, the interest of fair and efficient
5 resolution of the claims, end quote.

6 We would insist--we want to hear you now,
7 but we would insist to have your determination in
8 writing on this, being understood that it wouldn't
9 be understood as binding forfeiture conduct. So
10 can you give us your views not as to the merit of
11 this issue, if I may call it this way, but as to
12 the process? What I mean by the process, I mean,
13 would you agree that we have in the calendar a date
14 by which you would say at this stage we don't
15 intend to consolidate within the meaning of 1126
16 for this and that reason. That gives us some kind
17 of indication, being understood that no party would
18 be bound by this, and it would not be viewed as a
19 bar to consolidate afterwards, which I do not think
20 would be fair to do, and certainly it would not be
21 binding on other parties which may have an interest
22 in doing that. So, in any event, it would create

1 some kind of imbalance, so we are not saying that,
2 but we would like to have an indication as to why
3 you have a mechanism which is geared at ensuring
4 consistency and no party seems to want to avail
5 itself of it.

6 So, as to the process, maybe on claimant's
7 side.

8 MR. MITCHELL: Obviously having spent
9 three long and intense days with the Tribunal, the
10 parties have, I think, manifested their intention
11 that this Tribunal at this time addressed these
12 matters, and there are--obviously 1126 has not been
13 tested by anyone yet, and it has some interesting
14 features to it that may cause parties to not view
15 it as necessarily a desirable process.

16 I think what I can say is on behalf of the
17 claimant we are happy to provide in writing our
18 observations on the questions that you have raised
19 by a date that would be convenient to the Tribunal,
20 and I'm thinking at least two weeks or so.

21 PRESIDENT GAILLARD: Yes, of course. But
22 I'm not thinking by--by comments I'm not thinking

1 that you need to discuss the legislative history of
2 all this and the pros and cons and so on. It's
3 just a determination and with some supporting
4 reasons, I mean, elaboration on the reasons, and we
5 prefer to have that in writing.

6 So, what would be on the U.S. side about
7 this suggested conduct, from a procedural
8 standpoint?

9 MS. MENAKER: We have no intention of
10 invoking Article 1126 in this proceeding. That
11 being said, we have on numerous occasions talked
12 with claimants' counsel, who is also counsel for
13 one of the other claimants that has failed a Notice
14 of Arbitration and have asked them if they would
15 agree to voluntary consolidate that claim before
16 this Tribunal. If they change their minds on that
17 score between now and the time that a decision is
18 rendered, if they agreed to do that, we are still
19 open to having them do that.

20 But that being said, we have no intention
21 of invoking Article 1126 with respect to this
22 particular proceeding.

1 PRESIDENT GAILLARD: But you have nothing
2 against elaborating a little bit in writing on this
3 issue, or putting your position in writing in a
4 certain time frame?

5 MS. MENAKER: When you say elaborating, it
6 would be anything other than what I have just--

7 PRESIDENT GAILLARD: Maybe just what you
8 said, but just something.

9 MS. MENAKER: Sure.

10 PRESIDENT GAILLARD: The purpose of the
11 exercise is to make sure from our standpoint that
12 you thought about it seriously. I'm sure you think
13 about every issue very seriously, but we want that
14 in the record.

15 And I still have the suggestion to
16 consolidate at the 11th hour this case with other
17 cases simply because the counsel is the same. I
18 don't think we would expect that to be realistic,
19 nor do we want that because it would be unfair to
20 the parties. It's not just the lawyers, the
21 parties are not there, they're not present in the
22 room, they cannot follow, they cannot give

1 instructions with respect to this particular case.
2 So that's not what I had in mind. I didn't have in
3 mind a consolidation of various cases before us. I
4 had in mind a pure Article 1126, not a
5 consolidation-by-consent idea, but a pure Article
6 1126 consolidation.

7 So, if you would, I think it's clear
8 enough, if you would just let us know by a given
9 date, and this date can be, I don't know, can be
10 the same as the one we used, January 14, we would
11 like by January 14 to receive your submissions on
12 this.

13 MS. MENAKER: Mr. President, may I
14 inquire? I think we have made, I believe, our
15 position clear, and I can assure you that we have
16 given it considerable thought, that we have no
17 intention of invoking Article 1126 in this
18 proceeding.

19 Would it suffice if I told you that? We
20 would, of course, inform the Tribunal immediately
21 if our views on that subject changed.

22 PRESIDENT GAILLARD: Claimant has comments

1 on this? Would you like to think about it?

2 Because, frankly, I would like people to reflect,
3 to pause, to reflect, and to tell us without any
4 commitment for the future.

5 If I may, there is an element of oddity
6 because at some point we start deliberating, and
7 yet there is no--Article 1126 is a fairly simple
8 provision. It's not very elaborate.

9 MR. LANDRY: Mr. President, as Ms. Menaker
10 said, we have had numerous discussions with the
11 U.S. on this point. We have considered it, but we
12 are more than willing to set a date to accommodate
13 your request.

14 PRESIDENT GAILLARD: Given the position of
15 both parties, and we thank you for your trust,
16 let's put it this way. We do not request either
17 party to express their position in writing on this
18 issue, given what you have just said now.

19 For the record, what we want to say is
20 that if any party were to change their minds, it's
21 not an issue which has anything to do with us
22 individually or collectively as a tribunal. We are

1 here to serve justice, if I may say, or certainly
2 the parties, and we are happy to perform that
3 function.

4 We also recognize that we are what we are,
5 and there are other mechanisms. If any party wants
6 to avail itself of those mechanisms, it's perfectly
7 understood. So, we can leave it this way for the
8 time being. Thank you.

9 Now, the last--there were two questions.
10 One is the Article 1128 submissions. Pursuant to
11 Article 1128 on written notice to the disputing
12 parties, Party, capital P, may make submissions to
13 the Tribunal on the question of the interpretation
14 of this agreement. Clearly the matters we
15 discussed today and which were briefed in the
16 written phase of the jurisdiction aspects of this
17 jurisdictional challenge seem to us to raise
18 questions of interpretation of this agreement, in
19 particular Article 1901(3), but, of course, many of
20 the provisions are related or not, and we have
21 discussed all this.

22 So, it would not be abnormal for the other

1 parties to NAFTA to have views on this, and I
2 guess--I don't know how this is done. I think it's
3 more for the respondent, the state, maybe to
4 coordinate that with other parties to NAFTA? Since
5 they are here, I also raise the question, and our
6 desire would be to have maybe if the parties want
7 to avail itself any party to NAFTA wants to avail
8 itself of this possibility, we would like in a
9 relatively short time frame which can be discussed,
10 have a declaration of intention of this, like a
11 week, like 10 days, something which seems
12 reasonable, and then in another time frame which is
13 also reasonable to elaborate on the point they want
14 to make like a month, like whatever would seem
15 reasonable, they could submit something in writing.

16 I know that we made that offer earlier in
17 the proceeding, but it seems proper to us to
18 reiterate that offer at this juncture.

19 So, Ms. Menaker, I think you wanted to
20 mention how has it worked in other NAFTA cases? Or
21 is it, Ms. Menaker, is it usually--my question I
22 guess is, is it usually the defendant, the NAFTA

1 party which coordinates that with the other
2 parties, or is it the Tribunal directly?

3 MS. MENAKER: No, the respondent state
4 doesn't coordinate directly. Just what we do is
5 pursuant to the NAFTA, we make sure that the other
6 parties get all procedural orders and things of
7 that nature, so you would simply set forth a time
8 frame by which you wanted the other nonparty
9 participants to inform the Tribunal whether or not
10 they wished to make such a submission, and then
11 Canada and Mexico would directly inform the
12 Tribunal of their intent in that regard.

13 PRESIDENT GAILLARD: Mr. Mitchell, do you
14 have any view on this?

15 MR. MITCHELL: Yes, in our experience in
16 the past, indeed what's often happened is the
17 Tribunal has asked the other NAFTA parties whether
18 they wished to avail themselves of that
19 opportunity, and if they have not been in a
20 position to answer that question, the dates simply
21 set for the making of their submissions with the
22 qualification that they be confined to the question

1 of interpretation that Article 1128 authorizes.

2 PRESIDENT GAILLARD: Of course.

3 So, since they are present here--and this
4 would be confirmed in writing--let's say that the
5 Tribunal would like to know if, in principle, the
6 parties at this stage would like to avail
7 themselves of this possibility within, say, 10 days
8 from now, but that's a just yes-or-no answer.

9 And then if the answer is yes, we would
10 have a further month--would that seem
11 reasonable?--to submit any submissions, any
12 determinations as to the interpretation of NAFTA,
13 of the NAFTA provisions which have been discussed
14 in this case, and that should be fairly easy
15 because the proceedings are in Web site of the
16 U.S., and it's public. And thank you for your
17 presence here during this three-day hearing, so now
18 you are certainly fully aware--I'm sure you were
19 aware before, but you are fully aware of the
20 issues. And if you have anything to say as a party
21 to NAFTA, we are, of course, very interested to
22 know.

1 If the answer is yes, the parties may want
2 to write to us and ask us if that calls for--I
3 don't want to receive any answer. I just want--19
4 is a Sunday. Let's call it Monday, the 21st.

5 So, if that happens, it may be that the
6 parties react and say, oh, it's wrong, whatever,
7 they have things to say. I wouldn't want the
8 parties to submit a brief answering this. They
9 should ask the Tribunal for permission to submit
10 some kind of comments on those--on those
11 determinations, because it may be important to
12 their case.

13 In particular, if that raises arguments
14 which are new because, of course, it's the same
15 arguments made by one party, the due process is
16 probably satisfied. If it raises new issues which
17 were not canvassed in this hearing or the written
18 phase, then it's another matter. We may want to
19 have your views on certain new arguments, if any.

20 MR. MITCHELL: In our experience, and I
21 think the United States would confirm this, the
22 claimant and respondent have typically been

1 afforded the opportunity to react to any 1128
2 submission that is filed. The issue simply becomes
3 one of the length of time that is required to do so
4 in light of the scope of the arguments that are
5 advanced.

6 PRESIDENT GAILLARD: That seems
7 reasonable, frankly, if I may offer an answer right
8 now.

9 So are you saying that you would be more
10 comfortable if we were to say that should one party
11 make a submission, then you would automatically
12 have a certain time period to answer? Like three
13 weeks, two weeks, four weeks?

14 MR. MITCHELL: We would be agreeable to
15 three weeks.

16 PRESIDENT GAILLARD: All right. So, I
17 think it's better to set it out now. If there is
18 such a submission, then the parties would
19 automatically have the three-week period to answer,
20 being said that here again the back door rule
21 should apply. We don't want that to be an excuse
22 to reopen things, I forgot to say this and that,

1 and rehash all the arguments or things which are
2 new because that, in itself, creates new due
3 process problems. So, it would be limited to
4 submissions made by the NAFTA parties, if any,
5 pursuant to Article 1128.

6 So, the dates would be December 20 for the
7 intention to submit--to make a submission. It will
8 be January 20 for the submission itself, if any,
9 and February 10 for the comments of the parties in
10 case a submission is made by any other NAFTA party.

11 Now, my last point is that still for
12 procedural nature, and I don't ask the questions
13 because I think there is something to it, but
14 that's good practice. I would like at this stage
15 to ask the following questions:

16 Do the parties have any comments,
17 questions, or concerns regarding the manner in
18 which the proceedings in this arbitration have been
19 conducted by the Arbitral Tribunal?

20 MR. CLODFELTER: Mr. President, it's
21 somewhat awkward, but quite informally today we
22 learned a fact we did not previously know. We have

1 no idea whether it has any import whatever. But we
2 think in light of your question that we should just
3 raise it now. We learned that one of the counsel
4 for claimant has a familial relationship with
5 Professor Weiler of some distance.

6 ARBITRATOR WEILER: He has no
7 relationship.

8 MR. CLODFELTER: I'm sorry, I
9 misunderstood, then. Okay.

10 ARBITRATOR WEILER: I'm sure you would
11 know that I would raise it myself if it was.

12 MR. CLODFELTER: That's what we would have
13 expected. That clarifies it. Thank you. Sorry
14 about that.

15 ARBITRATOR WEILER: It's a matter
16 sometimes of gratification and sometimes of
17 announce that we share the same name.

18 MR. CLODFELTER: I can't imagine ever
19 annoyance, but anyway we apologize for the
20 misunderstanding.

21 Other than that, we have nothing.

22 PRESIDENT GAILLARD: On claimant's side?

1 MR. LANDRY: There is nothing we would
2 like to raise at this time, no.

3 PRESIDENT GAILLARD: Do the parties have
4 any objections of any kind to express in this
5 respect? On claimant's side.

6 MR. LANDRY: Same answer, there is nothing
7 we would like to raise at this time.

8 PRESIDENT GAILLARD: And on the
9 respondent's side?

10 MR. CLODFELTER: No, Mr. President.

11 PRESIDENT GAILLARD: Are there any
12 outstanding issues, including with respect to the
13 procedural matters that the parties wish to raise
14 with this Arbitral Tribunal at this stage?

15 MR. LANDRY: Not at this time.

16 PRESIDENT GAILLARD: On respondent's side?

17 MS. MENAKER: No, thank you.

18 PRESIDENT GAILLARD: Thank you. In that
19 case, that concludes this three-day hearing, and I
20 want to thank you all for the rich discussion which
21 we had, and it leaves us with a lot of work, but
22 that's perfectly fine.

1 I wish to thank our Court Reporter as
2 well. We were very harsh with him, but thank you,
3 Mr. Kasdan. And thank you. So, thank you and
4 goodbye.

5 (Whereupon, at 1:19 p.m., the hearing was
6 adjourned.)

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1 CERTIFICATE OF REPORTER

2

3 I, David A. Kasdan, RDR-CRR, Court

4 Reporter, do hereby testify that the foregoing

5 proceedings were stenographically recorded by me

6 and thereafter reduced to typewritten form by

7 computer-assisted transcription under my direction

8 and supervision; and that the foregoing transcript

9 is a true record and accurate record of the

10 proceedings.

11 I further certify that I am neither

12 counsel for, related to, nor employed by any of the

13 parties to this action in this proceeding, nor

14 financially or otherwise interested in the outcome

15 of this litigation.

16

17 DAVID A. KASDAN, RDR-CRR

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